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THE UNIVERSITY OF ALBERTA

THE BOARD OF REFERENCE IN ALBERTA: 1970 - 1982

by

(C) FLORENCE ANN IFTODY

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

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OF MASTER OF EDUCATION

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ABSTRACT

This study describes and analyzes the composition, powers and duties, and operations of the Board of Reference during the time period of 1970 to 1982.

In 1970, the Board of Reference was established as the only statutory avenue of teachers' appeals for terminations and/or suspensions from contracts of employment and designations. This study found that the Board of Reference consistently enforced provisions of the School Act which cite procedures to be followed by both parties--teachers and school boards--to such disputes. Such enforcements of the legislation have established an expectation that school boards must indeed act "reasonably" when terminating and/or suspending teaching contracts and designations. The Board of Reference has established itself as an enforcer of good faith and fairness of procedure in disputes coming before it, and has encouraged good faith and fairness in the settling of such disputes at the school board level.

Through an analysis of many Boards of Reference cases, and an application of legal principles to the procedures used in these cases, this study characterizes the Board's of Reference functions to be those of a quasi-judicial body.

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The writer wishes to express her gratitude to all who have assisted her in this undertaking. She is indebted to the Alberta School Trustees' Association, to the Alberta Teachers' Association and to the Department of Education, for the use of source materials, and for the opportunity to interview officials who, through their close contacts with the Board of Reference, have kindly shared their gathered information and personal experiences. In particular, the writer expresses sincere gratitude to the Alberta School Trustees' Assocation lawyers, Mrs. Judith Anderson and Mr. Richard McNally for their friendly, knowledgeable advice and their continual sharing of documents relating to Boards of Reference cases.

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CHAPTER I

THE STUDY

This is a descriptive and analytical study of the composition, powers and duties, and operations of the Alberta Board of Reference during the time period of 1970 to 1982. This provincial statutory tribunal handles teacher appeals against school boards for suspension and/or termination from contracts of employment and/or designation, and school board appeals against teachers in instances where teachers may want a release from contracts of employment and/or designation. Although legislative history pertaining to the present-day Board of Reference is reviewed from 1905 to 1982, the focus of this study is on the procedures of its operations during the period of 1970 to 1982.

Purpose of the Study

One purpose of this study is to characterize the functions of the Board of Reference as either administrative, judicial, or quasi-judicial. Through analyzing this tribunal's procedures of operation, the writer has also set out to establish this body's degree of effectiveness as a safeguard mechanism for good faith and fairness in procedure, for both the teacher and the school board, in the

aforementioned dispute settlement situations coming before it. Thirdly, the legislated role of both the school board and the Board of Reference in cases of suspenion and/or termination from contract and/or designation are reviewed.

Statement of General Problems and Sub-Problems

To investigate the above-stated purposes, the following questions provide the foci for this study.

What are the STATUTORY ENACTMENTS of the Board of Reference, 1905 to 1969?

1. What was the role of the Minister of Education in ordinary contract terminations, summary dismissals and suspensions from contracts, and terminations from designations for the period 1905 to 1969?
2. What was the role of the statutory body, the Board of Reference, in contract terminations from 1905 to 1969?
3. What trends were evident in the statutes of 1905 to 1969 which were significant to the development of the Board of Reference, 1970 to 1982? What were the social, political, or legal forces behind these statutory trends?

What is the role of the school board in contract terminations, 1970 to 1982?

1. What remedies are available against wrongful dismissal?

What is the role of the Board of Reference in contract terminations, 1970 to 1982? What LEGAL PRINCIPLES are applicable to this tribunal?

1. What are the Board of Reference procedures in hearing appeals which are provided by statute?
2. What are the Board of Reference procedures in hearing appeals which are provided by common law?
3. Does the Board of Reference adequately adhere to the procedures provided by statute and common law?
4. On what grounds has the Board of Reference either upheld or reversed school board decisions?
5. What are the vehicles and grounds available for judicial review of Boards of Reference decisions?

How do the OPERATIONAL RESULTS of the Board of Reference, for the time period of 1970 to 1982, affect the teaching profession in Alberta?

1. What does an analysis of the total number of appeal applications received by the Registrar, Department of Education, reveal when compared to: (a) the total number of appeals reaching the stage of hearing by the Board of Reference; and (b) the total number of appeals reaching the stage of decision by the Board of Reference?
2. What implications for educators does an analysis of the Reasons for Decisions, or Judgements of Boards of Reference cases reveal in terms of legal precedents?

What is the future (destiny) of the Board of Reference?

1. To what extent does the operational history of the Board, viewed in conjunction with the Alberta Teachers' Association (A.T.A.) and the Alberta School Trustees' Association (A.S.T.A.) expectations, justify its continued existence?
2. Is it necessary to have a statutory body deal with teacher tenure conflicts?

Justification of the Study

This study is justified because the operations of the Board of Reference are of concern not only to the teaching profession, but also to the government as an equitable legislator and protector of the public interest in education. In 1970, the Board of Reference had its powers expanded, and an analysis of the purpose served by these powers, as inferred from the Board's operations from 1970 to 1982, is necessary. No one has studied in depth the operational means and ensuing results of the Board, 1970 to 1982, in order to make a judgement as to the need for its continued existence.

Delimitations of the Study

The study is restricted to an analysis of the Board of Reference operations from 1970 to 1982. Legal principles are applied in the operational analysis only to the extent of determining if the tribunal is in fact promoting equality in teacher-school board tenure conflicts, as provided for under the School Act, R.S.A. 1970. By no means does this study discuss all aspects of the legal principles as they would be understood in the context of administrative law. Although the writer's conclusions as to the advantages of having a statutory tribunal deal with professional dismissals may be applied to professional groups in general, they are made specifically keeping in mind teachers as a professional group.

Limitations of the Study

This study deals with only one group of professionals--teachers--and with the tenure employment aspect of teacher-school board relationships pertaining to suspension and termination of contract, and termination of designation during the limited time period of 1970 to 1982. This investigation is restricted by the availability of data (provincial government files are not open anymore). Also, obtaining access to records is difficult because these are kept in so many places--the Department of Education, the Provincial Court House, lawyers' offices, the Alberta School

Trustees' Association, and the Alberta Teachers' Association. Because there is no central registry of documentation for all Boards of Reference cases, it is difficult to get absolutely complete documentation for all appeals that were registered with the Registrar, Department of Education, and of all cases that actually came under review by the Board of Reference. All documents obtained are considered. However, any Board of Reference case decisions not obtained are not considered in the analysis of this thesis, although it is assumed that procedures and outcomes of such cases are roughly comparable to those in the available cases. The majority of the appeals considered in this study are teacher appeals because to date only one school board has entered an appeal to the Board of Reference. The writer was able to view only seven Boards of Reference hearings. An analysis of operational procedures during a hearing is limited to the seven cases viewed, unless direct mention is made to a particular Board of Reference "Reasons for Decision" or "Judgement." Thus, conclusions drawn are limited by the conditions set above.

Methods of Procedure

The investigation procedure includes file searches, interviews, legal document analysis, an examination of previous academic studies dealing with teacher tenure legislation, and an analysis of studies and articles dealing with tribunals.

This study gained support from materials relating to both education and administrative law. Materials studied within the first category, dealing with educational criteria, are of five types. The first category includes the provisions of the School Act, setting forth the powers and duties of the Board of Reference; second, available information about the operations of this agency from the files of the Alberta School Trustees' Association, the Alberta Teachers' Association, and the Department of Education; third, notes from interviews with people who, through the course of their respective employments, came in contact with various aspects of Board of Reference operations; fourth, orders of the Board of Reference including written opinions given by educators sitting on the Board, and written or oral opinions given by judges of the Alberta Courts, who also sat on the Board; and fifth, British and American studies dealing with teacher tenure legislation from both the legal and educational points of view. Materials studied within the second category deal with the classification of functions for tribunals, the comparative parts of natural justice, the idea of "good faith" and "fairness" in procedural operations, and the available vehicles and grounds for judicial review from a tribunal's decision. These materials included previous studies, articles, and court judgements pertaining to various operational aspects of tribunals.

Review of Related Investigations

The investigator made a search of the theses listed in the catalogue of the library of the Faculty of Education, University of Alberta, for the purpose of finding relevant material. The only publication bearing directly upon tenure law in Alberta was completed in 1961 (Swan, 1961). The emphasis of this study was to examine the evolution of teacher tenure legislation in Alberta, and to criticize the form of the provisions in the School Act. This study concluded that a very desirable improvement in the relations between teachers and trustees had taken place during the period in which a Board of Reference had operated. Also, Swan concluded that the Board had proven to be an effective protector of teacher tenure and, therefore, of efficient school operation. Since Swan's study, no other in-depth study of the Alberta situation has been undertaken.

Preview of Thesis Organization

The present chapter has been concerned with establishing a problem for investigation. It has stated problems and sub-problems, outlined the need for the study, delimited the study, and reviewed procedures to be followed in collecting these data.

Chapter II is a historical description of relevant statutory trends in the development of the Board of Reference, and in the role of the Minister in contract termination

and designation termination disputes for the time period 1905 to 1969.

Chapter III reviews the role of both the school board and the Board of Reference in contract termination disputes for the time period of 1970 to 1982. Remedies against wrongful dismissal by the school board and remedies against Board of Reference decisions are also discussed.

Chapter IV reports on and analyzes the originating number of appeals filed and the declining number of appeals reaching the decision stage in the appeal process for the period of 1970 to 1982.

Chapter V discusses the future role of the Board of Reference, and the feasibility of introducing similar statutory bodies for the governing of other professional groups. This chapter also mentions questions in need of researched answers on this topic.

Use of Terms and Abbreviations

Throughout the study, "board" is used to mean a school board; "Board" means the Board of Reference, and "Minister" the Minister of Education.

When referring to Board of Reference decisions, "dismissal" may have two meanings. In most decisions "dismissal" means that no decision or order was reached by the presiding Board of Reference. In a few cases where "dismissed" has been used by the presiding Board to mean that the appellant's requests were not allowed, the writer clearly indicates this particular usage of the term.

A "hearing" refers to a session of inquiry into the facts of the issue to be decided upon at either the Board of Reference level or school board level. Other specialized legal terminology is explained as it occurs in the context of this study.

"Contract" denotes the written agreement to employment of both school board and teacher, that the teacher has in point of fact a privilege of continuous employment from year to year with that particular school board, unless otherwise specifically stated. The term "contract" encompasses neither "conditions for employment" nor "working conditions" as both of these items have long since become matters negotiated between the Alberta Teachers' Association local unions and the various school boards, districts or counties within Alberta. The teachers' privilege of continuous employment from year to year has often been referred to as tenure legislation.

In this study, "tenure" is defined as encompassing a set of rights, conveyed and protected by law, whereby a teacher cannot be dismissed from his position except by procedures laid down by statute.

In the text of this study, the following abbreviations will have the meanings indicated:

1. Act - The School Act of Alberta;
2. A.S.T.A. - Alberta School Trustees' Association;
3. A.T.A. - Alberta Teachers' Association;
4. c. - chapter in the statutes of a given year;

5. R.S.A. - Revised Statutes of Alberta of a given year;

6. S.A. - Statutes of Alberta of a given year; and

7. s. - section of a given statute.

CHAPTER II

STATUTORY AND OPERATIONAL HISTORY OF THE BOARD OF REFERENCE, 1905 - 1969

Introduction

Predecessor statutory creations leading up to the present day Board of Reference had three distinctive statutory developmental stages, as depicted in Table 2.1: (a) 1905 to 1920 when there was only Ministerial involvement; (b) 1921 to 1969 when Ministerial involvement co-existed with statutory body involvement; and (c) 1970 to the present day when only statutory body involvement existed.

Chapter II of this study summarizes, first, the Ministerial involvement from 1905 to 1969 and, second, the statutory body involvement from 1921 to 1969.

Ministerial Involvement

Legislation of 1905 - 1920

If the basic element of teacher tenure legislation is the provision of some protection for teachers against arbitrary dismissal by their employing boards, then such legislation, by virtue of section 153, chapter 29 of the Ordinance of 1901, existed when the province of Alberta was established in 1905.

Table 2.1

Statutory Developmental Stages of Present Day Board of Reference

Stage	Ministerial Involvement	Statutory Body Involvement	Name of Body	Time
1	yes		Commissioner of Education	1905 - 1910
	yes		Minister of Education	1910 - 1920
2	yes	yes	Board of Conciliation	1921 - 1926
	yes	yes	Board of Conciliation also called Board of Reference	1926 - 1941
	yes	yes	Board of Reference	1942 - 1969
3		yes	Board of Reference	1970 - 1982

> 153. Any teacher who has been suspended or dismissed by the board may appeal to the Commissioner who shall have the power to take evidence and confirm or reverse the decision of the board and in the case of reversal he may order the reinstatement of such teacher:
>
> Provided that in case there is no appeal to the Commissioner or in the event of an appeal if the decision of the board is sustained the teacher shall not be entitled to salary from and after the date of such suspension and dismissal.

Although section 153 states that a dismissed teacher may appeal to the Commissioner, the section does not state under what conditions a teacher may in fact be dismissed or suspended. Presumably a teacher could have been suspended or dismissed for not carrying out the "duties of a teacher," as prescribed by section 158, subsections 1 to 18. Briefly, these overwhelming lists include: teaching, discipline, timetable, register, promotions, public examinations, monthly reports, Arbour Day, sanitary condition of school room, care of property, reporting of needed repairs, privies, contagious disease, suspension of pupils, returns to department, give information re school to commissioner, inspector and board, give up school property when required, and to attend meetings called by the principal. Nothing in the school Ordinance, however, limits a teacher's possible dismissal or suspension only to these stated items. Thus, it might have been possible for teacher dismissal if the community or board found the teacher "not suitable" to the general humor of either board or community.

Only section 153 sets out any guidelines as to composition, appeal procedures, and powers and duties. The

section does not define the commissioner's duties in entertaining evidence or even any cut-off date for entertaining teacher-appeal requests. Appeal procedures, powers and duties, hearing procedures and ensuing operations as a result of the commissioner's "taking evidence and confirming or reversing the decision" are not mentioned. It is not stated whether or not a school board would have to abide by the commissioner's findings.

Although sections 159 and 160 make reference to a principal, there does not appear to be written statement that the principal is also entitled to an appeal.

> 159. In every school in which more teachers than one are employed the head teacher shall be called the principal and the other teachers assistants. C.O. c.75, s.100.
>
> 160. The principal shall prescribe with the concurrence of the board the duties of the assistants and shall be responsible for the organization and general discipline of the whole school. C.O. c.75, s.101.

It is doubtful that a principal was treated as a "teacher," as referred to in section 159 to "head teacher."

In 1910, "Commissioner" was changed to "Minister" of Education. Everything else remained unchanged until 1921 (R.S.A., 1910(2), c.6, s.2).

Legislation of 1921 - 1969

During this time period, Ministerial involvement is discussed in terms of: (a) summary dismissal and suspension; (b) ordinary dismissals; and (c) designations.

Summary Dismissal and Suspension

From 1921 to 1969, cases of summary dismissal and suspension were referred to the Minister for "Ministerial Investigation." In 1931, grounds for dismissal were inserted into the legislation.

> 159. (1) Any teacher may be suspended or dismissed summarily for gross misconduct, neglect of duty, or for refusal or neglect to obey any lawful order of the Board, which shall thereupon transmit a written statement of the facts to the Minister.
>
> (2) Any teacher who has been suspended or dismissed summarily by the Board, in pursuance of the preceding subsection, may within fifteen days, appeal to the Minister, who may take evidence and confirm or reverse the decision of the Board and in the case of a reversal he may order the reinstatement of the teacher. (R.S.A. 1931, c.32, s.159)

"Suspended" meant "to cause to cease for a time; to forbid a public officer from performing his duties or exercising his functions for a more or less definite interval of time" (Black's Law Dictionary). Presumably, this allowed time for an investigation to take place. "Dismissed" meant "a release or discharge from employment" (Black Law Dictionary). "Summarily" meant "without delay," "without the formality of a full proceeding" (Black's Law Dictionary). Thus, "dismissed summarily" connotes the firing of a teacher without the thirty-day notice in writing, subject to section 157 of the Revised Statutes of Alberta, 1931, while "suspended" connotes a more benevolent removal implying that an investigation into the matter may result in reinstatement by the school board. The term "gross misconduct" means a

"transgression of some established and definite rule of action, a forbidden act, a dereliction from duty" (Black's Law Dictionary). Gross misconduct is normally associated with actions coming within the scope of the Criminal Code. "Neglect of duty" as a teacher, and "refusal or neglect to obey any lawful order of the {school} Board carried the same interpretations as were given in the Ordinance of 1901.

In 1937, the termination of contract by the Minister was further clarified, and resulted in the following legislation.

> 157a. With the approval of the Lieutenant Governor in Council the Minister by notice in writing to the teacher and the Board given in the manner prescribed in clause (c) of subsection (1) of section 157, may at any time summarily terminate the contract of any teacher and any such termination shall be final and shall be binding upon the Board and the teacher. (R.S.A. 1937, c.43, s.7)

Thus, this sudden termination could occur at any time during the year, and the Minister's decision, subject to Cabinet approval, was now stated as being final and binding on both parties.

In 1938, a new section made it clear that any teacher summarily terminated could not make application to the Board of Reference for further hearing (R.S.A. 1938, c.37, s.6).

In 1942 section 160, which was renumbered as section 170, now also dictated that the appeal application was to be sent to the Minister by registered mail.

In 1961, a new subsection--number 350(1)(b)--added another cause for suspension. The legislation read as

follows:

> 350a. (1) Where the board has reasonable grounds for believing that
> (a) a teacher has been guilty of gross misconduct, neglect of duty or refusal or neglect to obey a lawful order of the board, or
> (b) the presence of a teacher is detrimental to the well-being of the school for reason of mental infirmity, the board may suspend the teacher from the performance of his duties. (R.S.A. 1961, c.71, s.23)

Section 350a also stated that a school board must give notice of suspension in writing, and that the teacher had ten days within which to launch an appeal.

> (2) The board shall give notice in writing to the teacher setting forth the reasons for suspension and forthwith transmit a written statement of the facts to the Minister.
> (3) A teacher who is suspended by the board may within ten days appeal to the Minister. (R.S.A. 1961, c.71, s.23)

Now, according to section 350a, the procedure of the Minister, when investigating, was also more detailed.

> (4) The Minister shall
> (a) investigate the matter and confirm or reverse the decision of the board, and
> (b) inform the board and the teacher of his decision within ten days of the conclusion of his investigation.
> (5) Where a teacher is suspended pursuant to clause (b) of subsection (1), the Minister may require the teacher to produce a certificate from a medical practitioner appointed or approved by him, certifying as to the teacher's health.
> (6) If the teacher refuses or fails to produce such a certificate, the Minister may authorize the board to terminate the contract of the teacher by giving such period of notice as the Minister may direct.
> (7) Where the Minister confirms the suspension the board may terminate the suspension or take action to terminate the contract of the teacher in accordance with this Act.

> (8) Where the teacher does not appeal to the Minister the board shall make such investigation of the circumstances as it deems proper and may reinstate the teacher, either from the date of suspension or some other date, or may take action to terminate the contract of the teacher in accordance with this Act.
>
> (9) A teacher shall receive his salary for the period during which he is under suspension unless the Minister in his discretion and on the application of the board declares that salary is not payable for any portion of the period. (R.S.A. 1961, c. 71, s.23)

Subsection (8) held that the school board was responsible to make an investigation into the circumstances of a case before terminating a teaching contract.

In 1962, section 350 was amended and now also gave the Minister the power of delegating the investigation of a case to another person or persons. It read as follows:

> 23. Section 350 is amended
> (a) by striking out subsection (2) and by substituting the following:
>
> (2) The board shall give notice in writing to the teacher, which shall state the reasons for the dismissal, and shall forward a copy of the notice to the Minister.
>
> (b) by striking out subsection (4) and by substituting the following:
>
> (4) The Minister, or some person or persons appointed by him, shall investigate the matter, and the Minister shall confirm or reverse the decision of the board.
> (R.S.A. 1962, c.80, s.23)

The person(s) delegated to investigate would have all the powers of investigation that had been bestowed upon the Minister. The Minister would now probably act upon the advice of his investigator(s) as to whether or not the school board's decision would be confirmed or reversed.

In 1967, the above quoted section 23 underwent a

change which combined the legislation of 1961, s.350a dealing with suspensions, and the legislation of 1962, s.350(2) dealing with dismissals. Since 1967 a school board was required by legislation to give its reasons in writing for both suspension and dismissal (R.S.A. 1967, c.297, s.20). There were no further changes to the power of the Minister until the legislation of 1970.

Ordinary Dismissals

Basically, the right of appeal from ordinary dismissals during this time was carried over from section 153 of the Ordinance of 1901, in that a teacher did have the right of appeal to the Minister of Education. A 1934 modification stated that either party to the dispute or disagreement, school board or teacher, could make application to the Minister to refer such dispute to the Board of Reference (R.S.A. 1934, c.30, s.160).

In 1941, a further amendment to section 160 was made, and read as follows:

> 15.(c) by striking out subsection (5) thereof and substituting the following:
> (5) Upon any such application being made to the Minister the termination or cancellation of the contract or engagement shall not take effect until the Minister shall have received the report of the Board of Reference as to the determination made thereof. (R.S.A. 1941, c.35, s.15)

This clarified the role of the Minister in referring teacher appeals in cases of ordinary dismissal, to the Board of Reference. In these cases it was not evident that the Minister had to be made aware of the findings of any Board

of Reference before this finding could take effect. Thus the Minister had a duty to oversee the final results in cases of ordinary dismissal. Although this provision was renumbered in legislation rewritings, it otherwise remained unchanged in meaning.

In 1942, section 171(9) stated that the Minister could refer an appeal application to any one of the three members of the Board of Reference for investigation (R.S.A. 1942, c.175, s.171, ss.9).

In 1955, it was stated that a teacher could not initiate a contract termination during a school year unless Ministerial consent was obtained (R.S.A. 1955, c. 297, s.341).

In 1962, section 340 was amended to give the Minister the power of delegating the investigation of ordinary dismissal cases to another person or persons (R.S.A. 1962, c.80, s.22). The person(s) delegated to investigate would have all the powers of investigation that had been bestowed upon the Minister. The Minister would act upon the advice of his investigator(s) as to whether or not the school board's decision would be confirmed or reversed. The Minister's power remained unchanged until the 1970 legislation.

Designations

Not until 1946 was there any legislation for the termination of the designation of principal and vice-principal.

> 9. The said Act is further amended as to section 178 by striking out the same and by substituting therefor the following:
>
> 178. (2) In the event that any teacher is designated to be a principal, vice-principal or assistant principal, such designation shall remain in effect unless and until terminated in the same manner as is provided by section 167 for the termination of the contract of employment or engagement of a teacher:
>
> Provided, however, that notice of termination of the employment as principal, vice-principal or assistant principal may be separately given, in which case the engagement as teacher shall not be affected. (R.S.A. 1946, c.46, s.9, ss.2)

This was the first legislation which made explicit that although a person could be relieved of a designation, the person's contract as a teacher could remain unaffected. Section 167 referred to the time element of giving notice, and the means by which notice was to be delivered to the teacher. However, it was not stated whether a designee could appeal to either the Board of Reference or the Minister.

In 1949, items from section 167 and the above section 178(2) were combined into new subsections.

> 20. The said Act is further amended as to section 178 by striking out subsection (2) and by substituting the following:
>
> (2) If a teacher is designated to be principal, vice-principal or assistant principal of any school, the designation shall remain in effect until terminated by thirty days' notice in writing, of a resolution of the Board terminating the designation or

> the giving of thirty days' notice in writing by the designee.
>
> (3) The notice may only be given on or before the 15th day of June to be effective in the month of July unless the consent of the Minister, to a notice effective at some other time, has been obtained.
>
> (4) If the notice is given to be effective in the month of July the person receiving the notice, within seven days of the receipt of the notice, may request in writing a hearing before the (school) Board.
>
> (5) If a hearing is requested, the (school) Board, within fourteen days of the receipt of the request, shall provide an opportunity for the principal, vice-principal or assistant principal, as the case may be, to appear before the Board or a committee thereof to hear the reasons for the withdrawal of the designation and to reply thereto.
>
> (6) If the principal, vice-principal or assistant principal is dissatisfied with the reasons given, and the Board does not withdraw its notice, he may appeal, within seven days, to the Minister who shall cause investigation to be made and who may in his sole discretion confirm the termination or disallow the same. (R.S.A. 1949, c.91, s.20)

Subsections (2) and (3) were the same as those applying to the giving of notice to teachers for termination of contract, in respect to the timing of notice. Subsection (4) added an element previously unlegislated, which was "may request in writing a hearing before the Board." Unfortunately, this hearing could be requested only if the termination notice took place in the month of July. Subsection (5) denotes that if a hearing is requested the school board is under the obligation of the School Act to extend this form of natural justice to the designee. This is stated in the words, "shall provide an opportunity." Subsection (6) places the designee's right of appeal under Ministerial investigation, thus eliminating statutory appeal to the Board of Reference.

Since 1962, the Minister could delegate another person or persons to investigate termination of designation cases (R.S.A. 1962, c.80, s.22). Terminations of designation remained within the Minister's domain until 1970.

Because government files are no longer open, the writer cannot make any statement as to the number of appeals handled by the Minister, 1961 to 1970. Nor can the writer, therefore, make any generalizations about the types of decisions given by the Minister on appeals handled by him. However, the writer was able to obtain partial documentation of eight cases of "Ministerial Investigation" for 1968 to 1970, inclusive. These findings and the Minister's recommendation, if it could be found in the filed documents, are shown in table form (see Table 2.2). This writer assumes that even in cases where the "Minister's Decision" was not found, that the Minister would in fact carry through his "Investigator's Recommendation."

Statutory Body Involvement

Legislation of 1921 - 1969

Indications that the legislature thought that at least some teacher-trustee disputes might best be dealt with by an authority other than just the Minister of Education were confirmed by the Revised Statutes of Alberta (1921), in that the Minister could appoint a Board of Conciliation.

Table 2.2

A Sampling of Ministerial Investigations
1968-1970

Year	Type of Case	School Board Reason	Investigator's Recommendation	Reason for Recommendation	Minister's Decision
1968	Teacher Suspension	s. 350a(1) (a)	suspend under s. 350a terminate under s. 339 & s. 340 payment of wages up to termination date	differences & inconsistencies in evidence bias	not found in file
1969	Principal suspension	s. 350a	suspension upheld	admitted use of public funds for personal purpose	not found in file
1969	Teacher suspension	s. 350a	suspension disallowed there be an opportunity for severance of contract under mutually satisfactory conditions.	according to evidence, case was only "unprofessional conduct"	not found in file

...cont'd

Table 2.2 (cont'd)

Year	Type of Case	School Board Reason	Investigator's Recommendation	Reason for Recommendation	Minister's Decision
1969	Teacher suspension	s. 350a	suspension upheld	gross neglect of duty and professional responsibility proven	suspension upheld
1969	Vice-Prin. termination designation	s. 372(3)	designation termination upheld	ill health causing neglect of duty proven	not found in file
1969	Principal termination designation	not mentioned	designation termination disallowed	lack of evidence and doubtful allegations	not found in file
1970	Teacher termination	s. 339 s. 340	upheld	evident that teacher did not accept or attempt to implement helpful suggestions serious problems for students, parents & school system	not found in file

...cont'd

Table 2.2 (cont'd)

Year	Type of Case	School Board Reason	Investigator's Recommendation	Reason for Recommendation	Minister's Decision
1970	Principal termination designation	not mentioned	disallowed	s. 371 & s. 372 had not been complied with in giving of notice of termination of designation, nor in the request for a hearing and a Ministerial Investigation	---

"Board of Conciliation"

151a. (1) Whenever it is made to appear to the Minister that any disagreement or dispute in the opinion of the Minister relates to the proper carrying out of the contract entered into between the board of trustees and such teacher or teachers, the Minister may appoint a board which shall be known as a "Board of Conciliation" to inquire into and investigate any such disagreement or dispute, and to make such report thereon as is just and reasonable, and in the conduct of such investigation said board may take evidence under oath or upon affirmation.

Provided, however, that no board of conciliation shall have power to intervene in connection with negotiations between any teacher and a school board with respect to any new contract or any extension or amendment or renewal of any contract already in existence.
(R.S.A. 1921, c.43, s.10)

The development of this statutory body during the forty-eight year period of 1921 to 1969 is discussed under the following divisions: (a) Composition; (b) Appeal Procedures and Operations; (c) Powers and Duties; and (d) Grounds for Termination.

Composition

The legislation of 1921 stipulated the composition of the Board of Conciliation in section 151(a)(2) as being one representative of the teacher, one representative of the school trustees, and one chairman who was neither teacher nor trustee.

151a. (2) Every such board of conciliation shall consist of three members, one representing the school trustees of the province, one representing the school teachers of the province, and the chairman of the board who shall be neither trustee nor teacher.

> (3) The members of a board of conciliation shall receive such remuneration as the Lieutenant Governor in Council may determine. (R.S.A. 1921, c.43, s.10)

In the legislation of 1926, the wording was changed from "appointment by the Minister" to "appointment by the Lieutenant Governor in Council" (R.S.A. 1926, c.57, s.197(1)).

In 1934, reference to teacher representation and trustee representation was dropped from the legislation.

> 160. (1) There shall be constituted a Board to be known as the Board of Reference to serve as a board of conciliation or as a board of arbitration, as the case may be, consisting of not more than three members appointed by the Lieutenant Governor in Council. (R.S.A. 1934, c.30, s.9)

Another change was legislated in 1942:

> 171. (9) The Minister may in any case in which he thinks it proper to do so, refer any application, dispute or disagreement or determination, to any designated member of the Board of Reference instead of referring it to the Board; and thereupon the member of the Board to whom the reference is made shall have the same powers and duties as are conferred or imposed by this section on the Board in the case of a reference to the Board, and subsections (3), (4), (5), (6) and (8) shall be construed as if the words "a designated member of the Board of Reference" had been substituted for the words "the Board of Reference" wherever the same occurs therein. (R.S.A. 1942, c.175, s.171)

Thus, if the Minister so chose, only one member or two members could constitute the Board of Reference. Since 1960, it was a common practice to have a list of about eight individuals, who were acceptable to both the trustees of the province and the teachers of the province, from which prospective members could be selected. Some of these members, who were civil court judges, in fact preferred to sit on a

Board of Reference by themselves. Legislation in regard to composition remained unchanged until 1970.

Appeal Procedures

The 1921 provisions said nothing about the procedures to be followed by either party to the dispute in order to gain a hearing before the Board of Reference. It was not until 1926 that the legislation corrected this situation. The procedures are discussed under the following divisions: (a) Form of Application; (b) Fees; (c) Application Deadlines; (d) Delimitations of Appeal; and (e) Withdrawal of Appeal.

Form of Application. The legislation of 1926 stated the following procedure:

> 197. (2) When any dispute or disagreement arises between a school board and its teacher or teachers, either party to the dispute of disagreement may make application to the Minister to refer such dispute to the Board of Reference.
>
> (3) All such applications to the Minister shall be accompanied by a full and complete statement of the nature of the complaint or dispute, verified by a statutory delcaration on the part of the party or parties making the said application.
>
> (4) Upon such receipt the Minister shall refer the dispute or disagreement in question to the Board of Reference, ... (R.S.A. 1926, c.57, s.5)

A "full and complete statement" was intended to reveal to the Board of Reference the alleged grounds for termination.

In 1932, the above-mentioned subsection (3) was amended as to the form of application and notice of application.

> 160. (3)(a) Every such application shall be in writing and shall set forth a full and complete statement of the nature of the complaint or dispute which shall be verified by statutory declaration on the part or parties making such application.
>
> 160. (3)(d) The party making such application shall, at the time of making application to the Minister, send to the other party to the dispute or disagreement a notice in writing to the effect that the application has been made to the Minister in pursuance of this section. (R.S.A. 1932, c.34, s.15)

As a result of the legislation, the body hearing and ruling on the dispute as well as the teacher and the school board shared a common knowledge of the allegations. The charges against the teacher not only had to be substantiated by evidence properly introduced, but the board had to charge the teacher in writing, stating the specific deficiencies.

Fees. In 1932, there was a twenty-dollar ($20) fee payable upon every application, which could be returned to the applicant on recommendation of the Board of Reference (R.S.A. 1932, c.34, s.15).

In 1934, the fee was raised to twenty-five ($25) dollars (R.S.A. 1934, c.30, s.160, ss.(3)(b)).

Application Deadlines. The first legislated application deadline was in 1932:

> 160. (3)(c) The application shall be delivered to the Minister within ten days after the date upon which the dispute or disagreement shall have arisen. (R.S.A. 1932, c.34, s.15)

The ten day limit for filing an appeal recognized a need to have disputes settled quickly.

In 1938, the time limit was changed to "not later than the tenth day of July next following the arising of the dispute" (R.S.A. 1938, c.37, s.6).

In 1942, the previously mentioned subsection 160 (3)(3) of 1932 was changed to having the application sent by registered mail to the Minister, rather than simply being delivered to the Minister. At this time section 160 was also renumbered to section 171.

In 1949, the deadline for the receipt of application was moved to "June 30 and within twenty days of the receipt of notice of termination or the arising of the dispute, as the case may be" (R.S.A. 1949, c.91, s.17).

These numerous amendments suggest that administrative difficulties for processing of the applications probably were considerable.

Delimitations of Appeal. In 1935, a new subsection was added to section 160, denoting the inapplicability of appeals where agreements were terminated in July.

> (9) Where an agreement of engagement between a teacher and a (school) Board is terminated by a notice of taking effect in the month of July, there shall be no reference to the Board of Reference in respect to any dispute or disagreement arising with reference thereto, and nothing in this section shall affect the right of either party to such an agreement to terminate the same by a notice which takes effect in the month of July. (R.S.A. 1935, c.44, s.8)

This amendment appears to be contrary to teacher tenure protection. It would seem that this would give school boards a wholesale license to dismiss teachers in July, without having

to justify a reasonable need for the dismissal. This in turn indirectly limited the powers of the Board of Reference in that it could not question any dismissals taking place in the month of July.

In 1938, another new subsection was added to section 160, once again clarifying the limitation of appeal.

> 6. (c) By adding at the end of the section the following new subsection.
> (10) None of the provisions of this section shall apply in any case where the contract of any teacher has been terminated with the approval in writing of the Minister. (R.S.A. 1938, c.37, s.6)

This would relate to summary dismissals which were strictly within the competence of the Minister.

In 1962, delimitations of appeal to the Minister also specified that:

> 24. (2) No application shall be made:
> (a) where the contract has been terminated with the approval, in writing, of the Minister,
> (b) Where the contract has been in effect for less than twelve months, or
> (c) Where the teacher has been summarily dismissed pursuant to section 350. (R.S.A. 1962, c.80, s.24)

Now the legislation clearly set out who in fact did have a right of appeal to the Board of Reference.

Withdrawal of Appeal. In 1954, a new provision was made for the withdrawal of an application to the Board of Reference.

> 351a. If prior to the investigation of a dispute by the Board of Reference the party making application, or his agent, requests of the Minister that the application be withdrawn, the Minister

> (a) shall not refer the dispute to the Board, or
> (b) if the application has already been referred to the Board, shall advise the Board of the withdrawal, and no hearing or investigation shall be required.

Obviously, many "out of court" settlements eliminated the need for hearings.

Power and Duties

In 1921, a new subsection number 151a stated the powers and duties of the "Board of Conciliation."

> 151a. (1). . . the Minister may appoint a board which shall be known as a "Board of Conciliation" to inquire into and investigate any such disagreement or dispute, and to make such report thereon as is just and reasonable, and in the conduct of such investigation said board may take evidence under oath or upon affirmation.
>
> Provided, however, that no board of conciliation shall have power to intervene in connection with negotiations between any teacher and a school board with respect to any new contract or any extension or amendment or renewal of any contract already in existence. (R.S.A. 1921, c.43, s.10)

The powers involved investigating only cases of dispute in the "carrying out of the contract" and the "taking of evidence under oath." It was also the Board's duty to make a report on the matter, which was to be "just and reasonable."

In 1926, the duties were further clarified. It was now empowered to institute the type of investigation it thought necessary in each appeal case.

> 197. (4) Upon receipt of such application the Minister shall refer to dispute or disagreement in question to the Board of Reference, which shall institute such investigations as may seem to be warranted and

> necessary, and shall deliver a report of its findings to the Minister, who shall transmit a copy of the same to the several parties to the dispute or disagreement.
>
> (5) The Board of Reference shall have power also to act as a board of arbitration, upon the request of both parties to any dispute between any board of trustees and its teacher or teachers, and when so acting the Board of Reference may, for the purpose of procuring the attendance of any person as a witness at such arbitration, serve such person with a notice requiring him to attend thereon, which notice shall be served in the same way and have the same effect as a notice requiring the attendance of a witness and the production by him of documents at the hearing or trial of an action, but no such person shall be compelled under any such notice to produce any document which he could not be compelled to produce on the trial of an action, and the award of the board in such cases shall be binding upon both parties and have the same force and effect as an award made under THE ARBITRATION ACT.
>
> (6) The Board of Reference shall have power also to deal with such matters as may be referred to it from time to time, by the Lieutenant Governor in Council. (R.S.A., 1926, c.57, s.5)

More power was given in regards to the procuring of witnesses. Subsection (5) denoted that the Board of Reference continued to have functions of merely investigating and reporting on disputes, without any power to make rulings as to the settlements when it was not acting as a board of arbitration. Also, nowhere does the legislation define "such other matters," as referred to in subsection (6).

In 1927, the Board was given powers of inquiry in accordance to the Public Inquiries Act, which read as follows:

> 3. (a) to force the attendance of witnesses, and
>
> (b) to compel them to give evidence, as is vested in a court of record in civil cases. (R.S.A. 1955, c.258,s.3)

Thus the legislation implied the need for regular court procedures in any Board of Reference investigation. The legislation in the School Act, referring to the Public Inquiries Act, read as follows:

> 356. For the purpose of investigating a dispute or disagreement referred to it, the Board of Reference shall have all the powers of a commissioner appointed under THE PUBLIC INQUIRIES ACT. (R.S.A. 1955, c.297, s.356)

Section 356 referred to the "attendance of witnesses at Board of Reference hearing" as side-noted in the School Act.

In 1931, an amendment to section 160 stated that the Board of Reference awards "shall be binding upon both parties."

> 160. (5) The Board of Reference shall have power also to act as a board of arbitration, upon the request of both parties to any dispute between any Board of Trustees and its teacher or teachers, and the award of the Board in such cases shall be binding upon both parties, and have the same force and effect as an award made under THE ARBITRATION ACT. (R.S.A. 1931, c.32, s.160, ss.5)

The Board of Reference now had power not only to investigate disputes, but also to settle them. This amendment did not go into effect until 1934 because there was much discourse during this period as to whether or not teachers should in fact have such tenure protection as was now vested within the Board of Reference powers. Now, the Board to which the teachers appealed was able to require the school board seeking to dismiss the teacher to accept the Board of Reference decision.

In 1941, clauses giving the Board power to serve "as a board of conciliation or a board of arbitration" were

struck out (R.S.A. 1941, c.35, s.15). Since its powers with respect to compelling the attendance of witnesses were no longer dependent on its functioning in either of these capacities, section 15 was no longer needed. However, its powers were now limited by restricting it to disputes "with respect to the termination or cancellation of a contract" (R.S.A. 1941, c.35, s.15).

Although the legislation specifying powers and duties of the Board of Reference was renumbered and amended for word clarity--several times--these basic powers and duties were not altered in any way until 1970.

Grounds for Termination

In 1931, a definite procedure for contract termination was beginning to emerge in the format of allowable "date of termination" (R.S.A. 1931, c.32, s.157). Suitable "form of termination notice" emerged in 1932 (R.S.A. 1932, c.34, s.15). "Length of required notice" for termination was legislated at 30 days in 1942 (R.S.A. 1942, c.175, s.167). Slowly, it was recognized that teacher contract terminations could be overturned if school boards failed to respect such statutory requirements. Actual grounds for termination fall under the following categories: (a) ordinary terminations; (b) terminations because of age; and (c) terminations dictated by a probationary period.

Ordinary Terminations. In 1934, the legislature amended section 160 and stated four reasons for allowing teacher contract termination by the school board:

> 9. (6) Where the dispute or disagreement between a Board of Trustees and a teacher is with reference to the termination of any agreement, if the Board of Reference is satisfied that the Board of Trustees in terminating the agreement did not act as reasonable persons should act in the discharge of their duties as trustees, and that the agreement was not terminated because of the misconduct or inefficiency of the teacher, or by reason of anything in the mode of life, character or disposition of the teacher detrimental to the proper and efficient conduct of the school for which the trustees are responsible, or by reason of the financial necessities or circumstances of the district, or for the reason that the termination of the agreement is conducive to the general welfare of the district and the betterment of the educational welfare of the district and the betterment of the educational facilities therein, the Board of Reference shall disallow the action of the Board of Trustees, otherwise it shall confirm the said action, and upon the delivery by the Board of Reference of its findings to the Minister, those findings shall be binding and conclusive upon the Board of Trustees and the teacher. (R.S.A. 1934, c.20, s.9, ss.6)

The Board of Reference was now limited as to grounds for dismissal, and had to base its decisions accordingly. The term "reasonable persons" of course delimited the actions of the school board. The "misconduct or inefficiency" of the teacher referred to both the teacher's character and morals, and the teacher's professional capabilities. "Financial necessities" of the district made allowance for teaching positions that were no longer required and were thus no longer feasible to finance within the district. This also enabled school boards to fire a teacher and hire another at a lesser salary. The "betterment of educational facilities

therein" made allowance for the consolidation of school districts, rural high schools, and the transporting of students to these consolidated high schools. School boards now had to justify their terminations on one or more of these four specific reasons, and were requested to act "as reasonable persons should act in the discharge of their duties as trustees." This legislation remains in practise to this very day.

Termination Because of Age. Not until 1944 was there any legislative reference for termination of contract by reason of age.

> 11. The said Act is further amended by adding immediately after section 166 the following new section:
>
> 166a. Every contract of employment and every engagement of a teacher shall terminate on the next following last day of the June term after the attainment by the teacher of the age of sixty-five years, provided that any board may retain the services of a teacher after such termination, and any teacher whose services are so retained shall be deemed to be a temporary teacher. (R.S.A. 1944, c.46, s.11)

Although this new section has been renumbered many times, it is still in effect today.

Termination Dictated by a Probationary Period. For a long time, Alberta legislation recognized the principle of a "probationary period" by excluding from the benefit of its tenure legislation teachers whose contracts had not been in effect for a minimum period of time. Until 1956, any teacher in Alberta, excluding those who had been summarily dismissed or suspended, and those for whom written Ministerial consent

was gotten for contract terminations, had the right of appeal to the Board of Reference. In 1956, an amendment forbade appeal when the teacher's contract had been in effect for less than twelve months (R.S.A. 1956, c.49, s.52). In practice, this meant and still means that some teachers may be on probation for more than one year, if they have a temporary contract of employment which may be given for a definite amount of time, up to twelve months. It also means that every teacher was, and still is, on probation throughout the first year of his service with any school board, since he had no right of appeal to the Board of Reference against termination of contract.

Summary

From 1905 to 1920, section 153 of the School Act allowed any teacher who had been either suspended or dismissed by a school board to appeal to the Minister of Education. It was the duty of the Minister to either confirm or reverse the school board's order.

During the 48-year statutory time frame of 1921 to 1969, the Minister investigated cases of summary dismissals and suspensions, and from 1949 also investigated termination of designation cases. Either party to the dispute, school board or teacher, could make application to the Minister or, in the cases of ordinary dismissal, could refer the dispute to the Board of Reference. When an ordinary dismissal application was before the Minister, the termination of the

contract could not take effect until the Minister had received the decision of the Board of Reference. In 1962, the role of investigation became a job that the Minister could delegate in all appeal instances. The delegated parties enjoyed the same investigatory powers as were originally given to the Minister. (See Table 2.3 for summary of legislation.)

During the same 48-year period of 1921 to 1969, statutory body involvement occurred in cases of ordinary dismissal. Since 1942, the statutory body was referred to as the Board of Reference.

The 1921 legislation allowed for the composition of the Board to be one representative of the teachers, one representative of the school trustees, and one chairman who was neither teacher nor trustee. The 1934 legislation simply made reference to a board consisting of not more than three members. In 1942, the legislation allowed the Minister to refer applications to any one designated member of the Board of Reference, if the Minister chose to do so.

Not until 1926 was there any direction in the legislation as to the procedure to be followed in gaining an appeal hearing before the Board. Over the forty-five year period, specifications were legislated as to the written form and delivery of application, fees of application, and allowable deadline dates for termination dates to be given by the school boards. Briefly, the notice of termination was to be given thirty days in advance of taking effect. The notice was to be a full and complete written statement

Table 2.3

Legislation Re: Minister's Role
1905 - 1969

Year	Ordinary Dismissals	Summary Dismissals and Suspensions	Designations
1905	(s.153) - appeal to Commissioner		
1910	(s.153) - appeal to Minister		
1921		(s.159) - appeals only to Minister	
1931		(s.159) - grounds for dismissal: gross misconduct, neglect of duty; refusal/neglect to obey lawful order of school board (s.159) - appeal filed within 15 days of dispute	
1934	(s.160) - either party to dispute may appeal to Board of Reference		
1937		(s.157(a)) - summary dismissal may occur at any time	
1938		(s.159(a)) - no appeal to Board of Reference if summarily terminated	
1941	(s.160) - Minister must know findings of Board of Reference before findings can take effect		
1942	(s.171(a)) - Minister may refer application to any ONE member of B. of R.	(s.160 becomes s.170) - application sent to Minister by registered mail	

cont'd...

Table 2.3 (cont'd)

Year	Ordinary Dismissals	Summary Dismissals and Suspensions	Designations
1946			(s.178) - designation to be terminated in same manner as contract of employment - termination of designation and termination of employment may be separately given
1949			(s.178) - after appeal to school board, designee may appeal to Minister; Minister has sole discretion
1955	(s.341) - no teacher can terminate contract during school year without Ministerial approval		
1961		(s.350a) - notice of suspension must be given in writing - 10 days to appeal to Minister (s.350(1)(b)) - teacher may be dismissed for reason of mental infirmity	
1962	(s.350) - Minister may delegate investigation	(s.350) - Minister may delegate investigations (s.350) - school board shall give notice in writing to teacher for dismissal	(s.350) - Minister may delegate investigation

stating at least one of four legislated reasons for termination. Also, legislative allowance was made for the withdrawal of hearing applications because many "out of court" settlements were being reached. No application to the Board of Reference could be made where: (a) the contract was terminated with the approval in writing of the Minister; (b) the contract had been in effect for less than twelve months; or (c) the teacher had been summarily dismissed pursuant to section 350.

Since 1921, the Board had the power to take evidence under oath. This power was later enhanced by the ability to force the attendance of witnesses, and to compel witnesses to given evidence. It was the Board's duty to make an investigation into a dispute assigned to it and to make a report on the matter which was "just and reasonable." Since 1934, the Board had the power to award decisions which would be binding on both parties to a dispute. The Board also had as its duty the necessity to test termination cases against the four legislated reasons for termination, and against whether or not a school board acted as "reasonable persons" in the discharging of a teacher.

Teachers whose contracts had not been in effect for a minimum period of time could not appeal to the Board of Reference, because contract termination was automatic by statute, on the date upon which the contract stated termination. Since 1944, teachers reaching 65 years of age had their continuous contracts expire automatically, and could not seek appeal before the Board of Reference. Teachers

relieved of designations had the right of appeal directly to the Minister, and not to the Board of Reference. (See Table 2.4 for summary of legislation.)

In each decade, the trend was for more clarity and detail in such matters as: (a) the composition of the Board; (b) the appeal procedures to be followed by both the school board and the teacher; (c) the powers and duties of the Board; and (d) the possible grounds for dismissal from contracts of employment and designation.

Table 2.4

Legislation Re: Board of Reference
1921 - 1969

Year	Composition	Appeal Procedures and Operations	Powers and Duties	Grounds for Termination
1921	(s.151(a)(2)) - Minister may appoint Board of Conciliation: one teacher rep., one trustee rep., one chairman neither teacher nor trustee		(s.151(a)) - Board of Conciliation may take evidence upon oath; may make such report as is just and reasonable	
1926		(s.197) - either party to dispute may make application - stating full statement of dispute	(s.197) - Board of Reference shall deliver copy of findings to Minister who shall transmit copies of findings to parties to dispute (s.197) - Board of Reference may act as Board of Arbitration upon request of both parties to dispute: (i) may serve notice upon witnesses	

(cont'd...)

Table 2.4 (cont'd)

Year	Composition	Appeal Procedures and Operations	Powers and Duties	Grounds for Termination
			(ii) award binding on both parties	
1927			(s.197) - Board of Reference may force attendance of witnesses and compel them to give evidence (s.356) - for purposes of investigation shall have powers of a commissioner under Public Inquiries Act	
1934	(s.160) - Board of Reference consisting of not more than 3 members	(s.160) - $25 fee	(s.160) - Board of Reference awards binding on both parties	(s.160) - 4 reasons: misconduct, inefficiency, character detrimental to conduct of school, financial necessity -school board must act as reasonable persons when terminating contracts

(cont'd...)

Table 2.4 (cont'd)

Year	Composition	Appeal Procedures and Operations	Powers and Duties	Grounds for Termination
1935		(s.160) - if teacher terminated in July, no appeal to Board of Reference		
1938		(s.160) - appeal request not later than 10th day of July (s.160) - no appeal to Board of Reference where contract of teacher terminated with approval in writing from Minister		
1941			(s.160) - Board of Reference powers limited to termination or cancellation of contract disputes	
1942		(s.171) - appeal sent to Minister by registered mail		

(cont'd...)

Table 2.4 (cont'd)

Year	Composition	Appeal Procedures and Operations	Powers and Duties	Grounds for Termination
1944				(s.166a) - termination at age 65, mandatory at end of school term
1949		(s.160) - receipt of application not later than June 30, and within 20 days of receipt of notice of termination or arising dispute		
1954		(s.351a) - party making application may request withdrawal of same		
1955		(s.341)-teacher may terminate contract only in July or August without Ministerial approval		
1956				(s.52) - amendment forbade appeal when contract in effect for less than 12 months (Probationary Year)

(cont'd...)

Table 2.4 (cont'd)

Year	Composition	Appeal Procedures and Operations	Powers and Duties	Grounds for Termination
1962		(s.24) - no appeal if contract in effect for less than 12 months or where teacher summarily dismissed pursuant to s.350		

CHAPTER III

LEGISLATION OF 1970 - 1982: ONLY STATUTORY BODY INVOLVEMENT

Introduction

All appeals to the Minister were dropped in 1970, and since then all appeals have been referred to the Board of Reference. Chapter III discusses this twelve-year period under the following headings: (a) The Role of the School Board in Contract Terminations; and Remedies Against Wrongful Dismissal by School Boards; and (b) The Role of the Board of Reference in Contract Terminations; and Remedies Against Board of Reference Decisions.

Role of the School Board in Contract Terminations

Power to Terminate

Contract Terminations

Section 77(2) states that "a contract of employment between a board and a teacher may be terminated by mutual consent" (R.S.A. 1970, c.329, s.77).

Section 78(1)(a) explicitly states that a board may terminate a contract of employment with a teacher, providing that the notice of termination is given at least 30 days prior to the effective day of termination (R.S.A. 1970,

c.329, s.78).

Designation Termination

Section 78(1)(b) states that a board may terminate a designation of a teacher made pursuant to section 82, providing that the notice of termination is given at least 30 days prior to the effective date of termination. Section 78(4) reads, "A notice of termination of a designation or the termination thereof does not terminate a contract of employment (R.S.A. 1970, c.329, s.78).

Suspensions

Section 78 enunciates the school board's right in suspending a teacher.

> 78. (3) A board may suspend from his duties any teacher who has been served with a notice of termination of a contract or of a designation.
>
> (5) A teacher who has been suspended is entitled to receive pay until the effective date of termination. (R.S.A. 1970, c.329, s.78; 1973, c.53, s.10; 1976, c.64, s.1(7))

Part-time Contracts, Temporary Contracts, Probationary Period Contracts, and Termination Because of Age

Section 76.01 defines the part-time contract situation:

> 76.01 (1) A board may employ a teacher under contract for a period that includes all the teaching days in a school year to teach on a part-time basis and be paid only for the time that he teaches.
>
> (2) Where the board employes a teacher under this section, the board may, unless that teacher's contract provides otherwise, vary the amoung of time that the teacher is required to teach in the subsequent semester or school year.

> (3) Where a board, under subsection (2), varies the amount of time that a teacher is required to teach and the teacher does not agree to teach for that amount of time, the board may terminate that teacher's contract of employment. (R.S.A. 1978, c.12, s.2(5))

Section 76.1(3) states the termination clause for a contract of temporary employment.

> 76.1 (3) Notwithstanding, anything contained in a temporary contract, a party to that contract may terminate that contract by giving to the other party of the contract 30 days' written notice of such termination. (R.S.A. 1970, c.329, s.76; 1972, c.84, s.7; 1977, c.42, s.6)

Section 76.2 deals with the one year contract, which also is referred to as the "probationary year" contract.

> 76.2 (1) A board may employ a teacher for a complete school year under a contract that terminates at the conclusion of that school year where that teacher
> (a) was not employed by that board as a teacher in the previous year,
> (b) was employed by that board in the previous year under section 89 or under a contract referred to in section 76.1, or
> (c) was employed by that board in the previous year under a contract that terminated under section 77(1)(c).
>
> (2) For the purpose of subsection (1), a teacher employed under section 76.01 is deemed to have been employed by the board for a complete school year when at the conclusion of a school year the total amount of time that the teacher has taught for the Board is at least equal to the amount of time the teacher would be required to teach in a complete school year if he had been employed by the board to teach on a full-time basis. (R.S.A. 1970, c.329, s.76; 1972, c.84, s.7; 1977, c.42, s.6; 1978, c.12, s.2(6); 1979, c.68, s.13)

It is worth noting that before the 1970 revision of the School Act, teachers did have a probationary year legislated. Since the 1970 Act dispensed with probation, many school boards in Alberta have made significant use of the one-year

contract provision remaining in the statutes. Thus, the school board is able to receive the work of the teacher, and evaluate the same during the temporary contract period. The net effect is the same as if there still existed a probationary year. Section 76.2 does, however, limit the continuation of one-year contracts to not more than two, because at the end of the second year the contract must either be made continuous, or terminated altogether.

Section 77 refers to contract termination because of age.

> 77. (1) A contract of employment between a board and a teacher automatically terminates (c) on the last day of the school year if the teacher has attained 65 years of age. (R.S.A. 1970, c.329, s.77; 1971, c.100, s.7; 1972, c.84, s.7)

Procedure to be Employed in Termination

Contract Termination

As previously mentioned, section 78(1) states that 30 days' notice must be given by the school board. Section 78(2) states, "a notice of termination of a contract of employment . . . shall specify the reasons for the termination and in each case the board shall act reasonably" (R.S.A. 1970, c.329, s.78). Further, section 81 states:

> 81. Subject to section 77, subsection (2), no notice of termination of a contract of employment may be given by a board or a teacher
> (a) in the 30 days preceding, or
> (b) during
> a vacation period of 14 or more days duration. (R.S.A. 1970, c.329, s.81)

Designation Termination

Section 78(1), stating that 30 days' notice must be given by a school board, applies to designation terminations too. Section 78(2) states, "a notice of a termination . . . of a designation shall specify the reasons for the termination and in each case the board shall act reasonably" (R.S.A. 1970, c.329, s.78). Section 78(4) points out that "a notice of termination of a designation or the termination thereof does not terminate a contract of employment" (R.S.A. 1970, c.329, s.78; 1973, c.53, s.10; 1976, c.64, s.1(7)). Section 81, quoted above, also applies to designation cases in that termination notices may not be given either in the 30 days preceding, or during, a vacation period of 14 or more days (R.S.A. 1970, c.329, s.81). Section 83(1), however, states:

> 83. (1) A teacher on receipt of a termination of designation may terminate his contract of employment by giving 30 days' notice in writing to the board, not withstanding section 81. (R.S.A. 1970, c.329, s.83; 1973, c.53, s.11)

Suspensions

Section 78(5) states that "a teacher who has been suspended is entitled to receive pay until the effective date of termination" (R.S.A. 1970, c.329, s.78; 1973, c.53, s.10; 1976, c.64, s.1(7)). Section 79 is more specific as to the procedure to be followed.

> 79. (2) The board shall
> (a) give notice of the suspension in writing to the teacher specifying therein the reasons for the suspension, and
> (b) forward a copy of the notice of suspension together with a written statement of the facts

alleged to the Minister.

(7) Where the Board of Reference confirms the suspension the board may terminate the suspension or terminate the contract of employment of the teacher.

(8) Where the teacher does not appeal to the Minister, the board shall make an investigation of the circumstances and may reinstate the teacher.

(9) A teacher shall be paid his salary until his contract of employment is terminated in accordance with this Act.

(R.S.A. 1970, c.329, s.79; 1971, c.100, s.8)

Subsection (8) makes it clear that a school board may choose not to terminate the contract of employment of the teacher. Presumably, the teacher could be reinstated in either the position from which he was suspended, or transferred to another teaching position.

Part-time Contracts, Temporary Contracts, Probationary Period Contracts, and Termination Because of Age

Section 76.01(3) states that a board may terminate a part-time teaching contract if the teacher does not agree to teach for the amount of time that the board requires each semester or school year. No other procedure is noted (R.S.A. 1978, c.12, s.2(5)).

In regard to the temporary contract, section 76.1 dictates:

76.1 (2) A temporary contract entered into under section (1)

(a) shall be in writing,

(b) shall specify the date upon which the teacher commences employment with the board, and

(c) terminates

(i) on June 30 immediately following the commencement date specified in the temporary contract, or

(ii) upon such date as may be provided for in the temporary contract,

whichever occurs first.

(3) Notwithstanding anything contained in a temporary contract, a party to that contract may terminate that contract by giving to the other party to the contract 30 days' notice of such termination. (R.S.A. 1970, c.329, s.76; 1972, c.84, s.7; 1977, c.42, s.6)

In regard to the one-year, or probationary contract, section 76.2(1) previously quoted, provision is made for contracts that terminate at the conclusion of the school year. Thus, no other procedure is necessary.

Section 77(1)(c), previously quoted, dictates that a teaching contract automatically terminates on the last day of the school year in which the teacher has attained 65 years of age.

Grounds for Termination

Contract Termination

The only reference to possible grounds for termination of contract is in section 78(2).

78. (2) A notice of termination of a contract of employment or of a designation shall specify the reasons for the termination and in each case the board shall act reasonably. (R.S.A. 1970, c.329, s.78; 1973, c.53, s.10; 1976, c.64, s.1(7))

Designation Termination

The only reference to possible grounds for termination of designation is quoted above in section 78(2).

Suspensions

Section 79(1) elaborates on possible grounds for suspension.

> 79. (1) Where a board has reasonable grounds for believing that
> (a) a teacher has been guilty of gross misconduct, neglect of duty or refusal or neglect to obey a lawful order of the board, or
> (b) the presence of a teacher is detrimental to the well being of the school for reason of mental infirmity,
> The board may suspend the teacher from performance of his duties.

Part-time Contracts, Temporary Contracts, Probationary Period Contracts, and Termination Because of Age

Section 76.01(3) states that a board may terminate a part-time contract on grounds that a teacher does not agree to teach the amount of time specified in the contract.

Section 76.1(2) states that a temporary contract can terminate solely because of the stated date of termination in the contract. Section 76.1(3) further states that either party to a temporary contract may terminate it by giving 30 days' written notice of such termination.

One-year contracts, by virtue of section 76.2(1) terminate automatically at the end of the school year.

Since the mandatory legislated age for retirement is 65 years, no other grounds for termination of employment need be present.

Remedies Against Wrongful Dismissal by the School Board

Private Law Remedies

The private law remedies of declaration, injunction and damages are traditionally the weapons of ordinary citizens in their battles with each other.

If an aggrieved individual seeks redress through the courts in the form of a declaration, the outcome would be a statement by the court declaring what the law is. A declaratory judgement may be used to make a simple declaration of the applicant's legal position.

An injunction is a prohibitive order directed to a party defendant in the action, forbidding the defendant to do some action that is unjust, inequitable, or injurious to the plaintiff. This court order may also address the defendant and require the defendant to do some particular act. For example, a school board may be addressed to reinstate a teacher into his contract of employment. Thus, an injunction may be mandatory or prohibitory.

If an aggrieved individual is not satisfied with simply overturning an unjust action, but also desires monetary compensation for the loss he has suffered in the interim, he would then seek reprisal through damages. The liability of the defendant would be determined in accordance with the principles of common law, in this case breach of employment contract.

However, if a civil dispute arose between a teacher

and a school board, a court would say that its jurisdiction to award damages for lack of reasonable notice has been taken away by operation of statute (Kerans, 1976:6). Section 78(1) of the School Act allows a school board to terminate a contract of employment with a teacher on thirty days' notice. According to Judge Kerans, at common law this would probably not be considered a reasonable period. The scheme of the School Act with regard to teacher job security must be understood in the context of the law of employment, sometimes called the law of master and servant (Kerans, 1972:4). In the master and servant relationship the employer may terminate by notice, providing that the period of notice is reasonable. What constitutes reasonable notice depends upon the circumstances of the case, including the nature of employment, the length of service the employee has given, and the length of the contract of employment. Also, the level of existing opportunities for an employee to gain new employment is a factor to be considered in giving notice. If reasonable notice is not given, money damages may be awarded. In common law, no reason need be given for termination by notice, providing that the period of notice is adequate. In some cases at common law, the employer may also terminate summarily, without notice, where "cause" exists. "Cause" describes conduct of gross dereliction of duty by the employee, which no reasonable employer need put up with. The cause need not be told the employee, but must be made out in court if the employer is questioned. Also, the School Act

does not make a distinction between summary termination and termination with due notice. It provides only for termination by a sort of notice created by statute. To some extent, the termination procedures at common law have been replaced by a statutory procedure.

Statutory Review

This method of obtaining redress through the courts is only available if conferred by statute. The Alberta School Act does not confer statutory review, thus this avenue of redress is not available to teachers.

Statutory Appeal

This method of redress is a purely statutory remedy. Section 85 of the Alberta School Act does grant the right of appeal to a statutory tribunal called the Board of Reference. Both school boards and teachers may appeal to this tribunal.

Role of the Board of Reference in Contract Terminations

Right of Appeal by Affected Parties

Contract Terminations

In regard to a termination of a teaching contract, either the school board or the teacher may appeal to the Minister who will refer the matter to the Board of Reference.

> 85. (1) Where a disagreement arises between a board and a teacher with respect
> (a) to a termination of a contract of employment, or
> (c) to the refusal of a board to give an approval pursuant to section 80, subsection (2)
> a board or teacher may appeal to the Minister who shall refer the appeal to the Board of Reference. (R.S.A. 1970, c.329, s.85, ss.1)

Section 80, subsection (2) reads as follows:

> 80. (2) Where a teacher has terminated his contract of employment with a board before rendering any service under the contract, no other board shall employ the teacher unless the prior approval of the board with which the teacher's contract was terminated, is obtained. (R.S.A. 1970, c.329, s.80)

The Minister's involvement is merely administrative.

However, a termination of contract taken under section 83(1) prohibits an appeal to the Board of Reference.

> 83. (1) A teacher on receipt of a termination of designation may terminate his contract of employment by giving 30 days' notice in writing to the board, not withstanding section 81.
> (2) No appeal may be made from a termination of a contract to the Board of Reference, if the contract of employment is terminated pursuant to subsection (1). (R.S.A. 1970, c.329, s.83; 1973, c.53, s.11)

Section 81 refers to the negation of giving a notice of termination in the 30 days preceding a vacation period of 14 or more days' duration.

Section 85(2) permits the withdrawal of an appeal in a termination of contract situation.

> 85. (2) An appeal may be withdrawn at any time before or during the hearing of the appeal or before the decision of the Board of Reference. (R.S.A. 1970, c.329, s.85)

Designation Termination

Section 85(1) permits an appeal to the Board of Reference as of right to the designee, or the school board.

> 85. (1) Where a disagreement arises between a board and a teacher with respect
> (b) to a termination of designation, or
> (c) to the refusal of a board to give an appeal pursuant to section 80, subsection (2)
> a board or a teacher may appeal to the Minister who shall refer the appeal to the Board of Reference. (R.S.A. 1970, c.329, s.85, ss.1)

Again, the Minister's involvement is purely administrative.

Section 85(2) permits the withdrawal of an appeal for a termination of designation application.

Suspensions

Since 1970, a teacher who is suspended by a school board may appeal to the Minister who shall refer the matter to the Board of Reference.

> 79. (3) A teacher who is suspended by a board may appeal to the Minister within 14 days after receiving the notice of suspension.
> (4) The Minister shall refer the appeal to the Board of Reference who shall:
> (a) investigate the matter and confirm or reverse the decision of the board, and
> (b) inform the Board and the teacher of its decision within 10 days of the conclusion of its investigation. (R.S.A. 1970, c.329, s.79, ss.3,4)

The Minister's role is now purely administrative in nature, whereas before 1970 the Minister or a chosen delegate dealt with suspensions.

It is possible to speculate that this legislative relationship was probably affected to some extent by an

Appeal Court ruling which overturned a Ministerial decision on May 6, 1970. The ruling referred to is that of Board of Trustees of Edmonton School District No. 7 Applicant, v Malati Respondent (1970) 74 WWR 434. Normally, a Minister's decision cannot be appealed, but in this case the Minister's interpretation of the meaning of the words "gross misconduct" was a meaning which as a matter of law, neither the words themselves, not the investigator's findings could bear. Thus, the application for certiorari to quash the Minister's decision was allowed because the Minister's interpretation of "gross misconduct" constituted an error apparent on the face of the record. No doubt, the Appeal Court ruling would have caused some political embarrassment.

Part-time Contracts, Temporary Contracts, Probationary Period Contracts, and Termination Because of Age

In the case of a part-time contract of employment, section 76.01(4) denies an appeal to the Board of Reference.

> 76.01 (4) Section 85 does not apply in respect of a termination of a contract under subsection (3). (R.S.A. 1978, c.12, s.2(5))

Subsection (3) states that the school board has the power to dictate the assignment to a part-time teacher. The teacher has the choice of either accepting the assignment, or losing the contract of employment. Part-time teachers do not enjoy the same job security as do full-time teachers. This is due primarily to the fact that part-time teachers are to some extent viewed as lacking in both commitment to

the job and responsibility on the job, in comparison to the full-time teaching situation.

Section 76.1(4) denies appeal to the Board of Reference in a temporary contract situation.

> 76.1. (4) Section 85 does not apply in respect of the termination under this section of a temporary contract. (R.S.A. 1970, c.329, s.76; 1972, c.84, s.7; 1977, c.42, s.6)

A temporary contract specifies the date upon which a teacher commences employment. It terminates either on a specified date or no later than June 30 immediately following the specified commencement date, whichever occurs first.

There is no right of appeal to the Board of Reference in the case of a probationary contract.

> 76.2. (1) A board may employ a teacher for a complete school year under a contract that terminates at the conclusion of the school year where that teacher
> (a) was not employed by that board as a (full year) teacher in the previous year,
> (b) was employed by that board in the previous year (as a temporary teacher), or
> (c) was employed by the board in the previous year under a contract that terminated under 77(1)(c). (R.S.A. 1970, c.329, s.76; 1972, c.84, s.7; 1977, c.42, s.6; 1978, c.12, s.2(6); 1979, c.68, s.13)

These contracts have a definite commencement date and a definite termination date. Thus, even at the end of a second year of teaching on a "one year contract" there may be no recourse for appeal if a school board chooses to terminate the contract.

Section 77(1)(c) states that on the last day of the school year in which a teacher attains the age of 65, the contract of employment automatically terminates. Thus, the

section need not make reference of an appeal to the Board of Reference. Such a teacher may, however, be employed on a one-year-contract basis under section 76.2(1)(c).

Composition of the Board of Reference

The composition of the Board of Reference is as follows:

> 84. (1) The Lieutenant Governor in Council shall appoint a Board of Reference consisting of not more than nine persons.
>
> (2) The members of the Board of Reference shall receive such renumeration and expenses as the Lieutenant Governor in Council determines. (R.S.A. 1970, c.329, s.84)

In the early 1970's, both the A.T.A. and A.S.T.A. drew up a list of nine persons whom both parties thought suitable to sit on a Board of Reference. The nine prospective members consisted of three judges and six educators. Usually three of the nine people would sit on any one appeal, and a Judge would always sit as Chairman. Later, in the 1970s, the Judges preferred to sit alone on the appeals. The opinion of one of the Judges was that if the Government considered that these dispute matters should be heard by a Judge, then the jurisdiction should be given to the Court, and the responsibility for the assignment of Judges to this work be left to the Chief Judge (letter June 25, 1976, from Judge Kerans to Julian Koziak, Minister of Education). Since 1976, the Alberta Teachers' Association, the Alberta School Trustees' Association, and the Registrar, Department of Education, did in fact agree to the names of about six Judges for service on the Board of Reference. Since 1976, all cases have been heard by only one Judge, sitting as a member of the Board of Reference.

> 88. (1) The Minister, in any case in which he considers it proper to do so, may refer an appeal to any one or to any two or more members of the Board of Reference.
>
> (2) Upon a reference of an appeal to the member or members of the Board of Reference pursuant to subsection (1), the member or members have all the powers, duties and functions of the Board of Reference and his or their decision shall be deemed to be a decision of the Board of Reference. (R.S.A. 1970, c.329, s.88; 1973, c.53, s.13)

Since the amalgamation of the Court Systems in Alberta in 1979, appeal cases to the Board of Reference have been scheduled and heard by any one Judge who was available to hear a case. In view of this, section 88(1) seems unnecessary. The role of the Minsiter is merely administrative in nature.

Procedure to be Followed in Filing Appeals

Whether appealing a termination of contract or designation or a suspension from contract or designation, one gets before the Board of Reference simply by filing the notice of appeal with the Minister as provided for in the School Act. Section 86 refers to the notice of appeal.

> 86. (1) The notice of appeal shall be in writing and shall set out the nature of the appeal.
>
> (2) The board or teacher appealing shall within 14 days of the receipt of the notice of termination of contract send by registered mail
>
> (a) to the Minister
>
> (i) the notice of appeal, and
>
> (ii) $50 (which is held by the Minister pending the decision of the Board of Reference, and
>
> (b) to the other party to the appeal a copy of the notice of appeal. (R.S.A. 1970, c.329, s.86)

Basically, the legislation did not change since it first

appeared in 1932, although section 86 does not state that the application "shall set forth a full and complete statement" as did the 1932 legislation. The same is in fact expected as a procedure of court, and is therefore implied in "shall set out the nature of appeal." These provisions, like a school board's requirements for a termination notice, are mandatory and an appeal will fail if the School Act requirements are not met.

As mentioned before, section 85(2) provides for the withdrawal of an appeal at any time.

Board of Reference Procedures in Hearing Appeals

Procedure Provided by Statute

The powers and duties of the Board of Reference directing its investigation into ordinary terminations of contract or designation cases fall into the three categories of: hearing date, investigation procedures, and orders, as set out in section 87 (R.S.A. 1970, c.329, s.87; 1973, c.53, s.12, 1979, c.68, s.17; 1981, c.36, s.4).

Hearing Date. Section 87(1) was legislated after it was accepted that Judges would sit on the appeals alone, and that it was up to the Chief Judge to schedule the available Judges for hearings.

> 87. (1) The Board of Reference shall set a date for the hearing of the appeal and notify both parties.

Investigation Procedures. Two subsections refer to the Boards of Reference investigation procedures.

> 87. (2) The Board of Reference may make such investigation as it considers necessary but before making any decision shall give both parties to the appeal an opportunity to be heard.
>
> 87. (6) For the purpose of making an investigation pursuant to this section, the Board of Reference has the powers of a commissioner under the Public Inquiries Act.

Section (6) does not differ in legislative format or intention from that of 1927 (R.S.A. 1955, c.297, s.356). The relevant sections of the Public Inquiries Act deal with matters of evidence and attendance of witnesses.

> (3) The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, or solemn affirmation if they are persons entitled to affirm in civil matters, and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire.
>
> (4) The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench. (R.S.A. 1970, c.296, s.4; 1978, c.51, s.29, eff. June 30/79)

Orders. The Board of Reference has sweeping powers. It may make such order as it deems just, but only after finding that a school board has failed in its duty.

> 87. (3) Notwithstanding any provision of this Act concerning the
> (a) termination of a contract of employment of a teacher, or

(b) termination of a designation of a teacher, or,
(c) suspension of a teacher
and matters connected therewith, the Board of Reference may make such order as it considers just with respect to the appeal.

87. (3.1) Without restricting the generality of subsection (3), the Board of Reference may, among other orders, make all or any of the following orders:
(a) an order providing that the termination date of the contract of employment or of a designation be changed;
(b) an order to provide for the reinstatement of a contract of employment or of a designation (but only where the teacher is the party appealing);
(c) an order for the payment of money, equivalent to salary, for any period whether before or after the termination of the contract or of a designation that a salary has not been paid;
(d) an order providing that no salary be paid for a specified period;
(e) an order determining whether there have been any procedures or technical irregularities in respect of the matter referred to in section 85.

87. (4) Each party to the appeal shall pay his own costs unless the Board of Reference otherwise orders and in the event that no order as to costs is made, the $50 held by the Minister shall be repaid to the person who paid it to him.

(5) The Board of Reference may make one or more of the following orders concerning the $50 paid to the Minister:
(a) that it be paid in whole or part to the person against whom the appeal was made in payment or part payment of costs;
(b) that it be retained in whole or in part by the Minister and paid into the General Revenue Fund;
(c) that it be repaid in whole or in part to the person who paid it to the Minister.

Although subsection (4) gives the sweeping powers that the Board of Reference may "otherwise order," in relation to appeal costs, subsection (5) succinctly states the options

which in fact have been used by the Boards of Reference in the past. Thus, the Board of Reference's actual decisions have been legislated as viable guidelines for future Boards of Reference decisions.

A new section 87.1 was assented to on June 2, 1981, which referred to the enforcement of a Board of Reference order.

> 87.1. (1) A copy of an order of the Board of Reference may be filed with the clerk of the Court of Queen's Bench in the judicial district in which the case of the proceedings before the Board of Reference arose.
>
> (2) On filing a copy of an award with the clerk of the Court of Queen's Bench pursuant to subsection (1), the order of the Board of Reference has the same force and effect as if the order were an order of that court. (R.S.A. 1981, c.36, s.4)

Although the above mentioned sections also apply to suspension cases heard by the Board of Reference, section 79 of the School Act states additional powers (R.S.A. 1970, c.329, s.79; 1971, c.100, s.8). Subsections (4) and (5) refer to investigation powers.

> 79. (4) The Minister shall refer the appeal to the Board of Reference who shall
> (a) investigate the matter and confirm or reverse the decision of the board, and
> (b) inform the board and the teacher of its decision within 10 days of the conclusion of its investigation.
>
> (5) Where a teacher is suspended pursuant to subsection (1), clause (b), the Board of Reference may require the teacher to produce a certificate from a medical practitioner appointed or approved by it, certifying as to the teacher's health.

Subsections (6) and (7) refer to the power of orders.

(6) If the teacher refuses or fails to produce a certificate pursuant to subsection (5) the Board of Reference may authorize the board to terminate the contract of employment of the teacher and upon so doing the board shall be deemed to have acted reasonably.

(7) Where the Board of Reference confirms the suspension the board may terminate the suspension or terminate the contract of employment of the teacher.

Procedures Provided by Common Law

Application of the Rules of Natural Justice. A tribunal denotes any person or group of persons or corporate body, on whom a statutory power, whether administrative or judicial, is conferred. A power is "administrative" if in the making of the decision the paramount considerations are matters of policy. A power is primarily judicial where the decision is to be arrived at in accordance with governing rules of law (Laux, 1975:7). In theory, the exercise of judicial power is confined to two operations: (a) a determination of the facts in a particular situation; and (b) declarations of the action required to be taken under the relevant rule of the law (Laux, 1975:3). In some cases administrative powers must be exercised by "acting judicially." The decision, although administrative because it is arrived at on grounds of policy, is to be made after compliance with certain minimum standards of fair procedure, resembling judicial procedure. In these cases the administrative power is termed quasi-judicial (Laux, 1975:8).

The rules of natural justice traditionally apply only to bodies which act judicially or quasi-judicially.

Natural justice denotes a system of rules and principles for the guidance of human conduct which, independently of enacted law, is found to be both rational and consistent and aims for truth (Black's Law Dictionary, 1968:1177). This system of rules forms the basic procedural requirements to be followed by a tribunal in arriving at a decision.

The characterization of a tribunal's function as administrative, judicial or quasi-judicial is of significance when a court decides whether or not to confer a right of redress from the tribunal's decision. Traditionally, the prerogative writs have been granted as vehicles of judicial review only in cases where the tribunals have been characterized as judicial or quasi-judicial in nature. Although the requirements of natural justice to be employed by a tribunal in arriving at a decision must depend on the circumstances of each case and the subject matter under consideration, Russell v. Duke of Norfolk (1949) 1All E.R. 109, 118, the extent to which it follows the requirements of natural justice is a very important factor in the determination of characterization.

The traditional approach for judicial classification cited in Nakkuda Ali v. Jayarante (1951) A.C. 66(H.L.) used the following two-prong test: firstly, if the tribunal in question was determining questions affecting a subject's rights; and secondly, if the tribunal had a duty to act judicially, then the vehicles of judicial review may have been granted. It was difficult to determine exactly when a tribunal did have a duty to act judicially. This particular

test seemed to indicate that determining questions affecting the rights of the subject did not in itself give rise to a duty to act judicially.

The judicial classification process did loosen up. In Ridge v. Baldwin and Others (1963) 2All E.R. 66(H.L.), the courts inferred the judicial character of the duty from the nature of the duty itself. Now the two-prong test being applied stated that: firstly, if a tribunal was determining questions affecting a subject's rights as well as property rights; then, secondly, the tribunal automatically had a duty to act judicially. Thus the seriousness of the adjudicative consequence for the individual affected by the conclusive decision of the tribunal exercising statutory powers have become the principle factor in determining whether the tribunal is required to act judicially or quasi-judicially: Durayappah v. Fernand (1967) 2 A.C. 337; Howard v. National Parole Board (1975) D.L.R. (3d) S.C.C. 349. Because of the inferred duty to act judicially when dealing with a subject's rights or property rights, any tribunal decision given without regard to the principles of natural justice may well be termed void or voidable by the courts.

Comparative Parts of Natural Justice. A statute conferring a power of decision may or may not make provision for the procedure to be followed in arriving at the decision. Where no procedure is prescribed for the exercise of the powers, it is necessary for the tribunal to decide whether

in the circumstances the procedural rules of natural justice are essential to a valid decision, and if so, what procedure is required to be followed (McRuer Report, 1968:136-147). No certain test can be laid down concerning the application of procedural rules of natural justice. The rules of natural justice do not involve all rules of procedure applicable to a court of law. The "rights" inherent in the rules of natural justice are briefly discussed.

1. Right to Notice of Hearing. An individual is entitled to receive notice of both the allegations and possible sanctions which may be imposed against him; Klymchuck v. Cowan (1964) 47 W.W.R. 467; 45 D.L.R. (2d) 587 (Man.Q.B.). The formal compliance of sending notice of a scheduled hearing is not enough if the notice does not allow a "sufficient" or reasonable length of time for the person to prepare a case in his defense, Beaverbrook Ltd. v. Highway Traffic and Motor Transport Board (1973) 4 W.W.R. 473. However, this "lack of notice" will not comprise a denial of natural justice if the person ought to have known the allegations against him, Regina v. Ontario Racing Commission, ex parte Taylor (1971) 1 O.R. 400 (Ont. C.A.). Reasonably, no one can present a case in his defense if he doesn't know the case against him, Errington and Others v. Minister of Health (1935) 1 K.B. 249 (C.A.). The sending of sufficient notice will give the person the opportunity to answer the case against him. It may be permissible for the decision maker to delegate someone to collect written or oral submissions and

to report them to the decision maker. Since in natural justice a person has no right to be personally present at any time before the decision maker, a reviewing of written submissions by the decision maker may also constitute a hearing, Local Government Board v. Arlidge (1915) A.C. 120 (1914-15) All E.R. 1 (H.L.).

It is axiomatic that unless a statute provides otherwise, notice upon a party to be affected is a condition precedent to the validity of the proceedings. However, if notice is given to the party and the party does not attend the proceedings, that voluntary act does not violate the proceedings conducted in the party's absence. Nor does it vitiate the proceedings if, of their own deliberate act, the party left during the hearing proceedings, Re Millward and Public Commission (1975) 49 D.L.R. (3d) 295 (Fed. Ct.).

2. Right to Examine Reports and Other Secret Evidence. An order cannot justly be made against an individual upon evidence not disclosed to him so that he may rebut it, Knapman v. Board of Health for Saltfleet Township (1954) O.R. 360; (1954) 3 D.L.R. 760 (Ont. High Court). If a hearing consists solely of written submissions, the deciding authority must disclose relevant communications made to it by each party to the other party so as to give reasonable opportunities for reply. There is no general rule requiring the disclosure of the evidential facts in the tribunal possession. Disclosure of a report is required if it contains the factual basis for a decision against the applicant, as

ruled in Regina v. Ontario Racing Commission, ex parte Taylor (1971) 1 O.R. 400 (Ont. C.A.). But if the report is merely part of the decision-making process, disclosure is not required, as ruled in Local Government Board v. Arlidge (1915) A.C. 120, (1914-15) All E.R. 1 (H.L.). Tribunals may make use of their technical and local knowledge and accumulated expertise to draw inferences from the evidence. However, a tribunal that is required to act on evidence cannot use its expertise and knowledge of local conditions to supplement the evidence (de Smith, 1959:113). The procedural rules of natural justice do not impose any requirement defining the admissibility of evidence before a tribunal. Pertinent allegations of confidential reports must be made known to the individual to an extent sufficient to enable him to respond to them and he must have a fair opportunity to dispute or explain them, Lazarov v. Secretary of State of Canada (1974) 39 D.L.R. 738 (Fed. C.A.).

3. Right to Particulars. In Re Wilson and Law Society of British Columbia (1974) 47 D.L.R. (3d) 760 (B.C.S.C.), it was established that "adequate notice" and "appropriate notice" are principles of natural justice that the persons subject to the proceedings are entitled to as a fundamental right. The notice must be specific as to allegations. However, it is up to the individual to exhaust all possible remedies available as to getting or demanding the particulars.

4. Right to Adjournment. In Re Piggott Construction and United Brotherhood of Carpenters & Joiners of America (1974) 39 D.L.R. (3d) 311 (Sask. C.A.), it was established that when requesting adjournment the applicant must show good reason for the request, and must address this request directly to the body within whose discretion the granting may lie, Re Speedhar and Outlook Union Hospital Board et al. (1973) 32 D.L.R. (3d) 491 (Sask. C.A.).

5. Right to Cross-Examination. There is no absolute right to cross-examination. The opportunity to cross-examine is dependent upon the circumstances of each case. If there are other ways in which a party's case can be adequately presented, then there is no right to cross-examination. However, if cross-examination was the only effective means of adequately presenting a material point, then cross-examination may be a right. Tribunals can obtain information in any way they think best, always giving a fair opportunity to the parties in the controversy to rebutt, Korytko v. City of Calgary (1963) 46 W.W.R. 273, 42 D.L.R. (2d) 465 (Alta. C.A.).

6. Right to the Applicability of Rules of Evidence. The procedural rules of natural justice do not impose any requirement defining the admissibility of evidence before a tribunal. However, the "evidence" which a tribunal accepts and acts on must have some probative value in the circumstances, Re Sisters of Charity (1951) 3 D.L.R. 735.

7. Right to Counsel. Every person has a right to an agent who may be a lawyer, Pett v. Greyhound Racing Association Ltd. (1968) 2 All E.R. 545 (C.A.). The right to counsel is a particular right necessary to allow a person to properly present his case, Re Bachinsky et al. and Sawyer (1974) 43 D.L.R. (3d) 96 (Alta. S.C.). If the seriousness of the consequence to the individual is one of losing his livelihood, natural justice would require that the individual have a right to counsel, Re Chisholm v. Jamieson et al. (1974) 47 D.L.R. (3d) 754 (B.C.S.C.). As a whole, Canadian cases seem to be moving to the position held in the Pett case mentioned above. The complex mass of Evidence Rules cannot be applied adequately except by technically trained lawyers.

8. Right to Open Court. When a statute directs that an inquiry should be held, but is silent as to the manner in which it shall be conducted, then it follows that the matter is left to the discretion of the particular tribunal. A general rule in such a case is that the proceedings of a statutory tribunal should be conducted in public unless there be good reason to hold them "in camera" (Regina v. Tarnopolsky, ex parte Bell (1970) 2 O.R. 672 at 680). These reasons include: (a) that the public will be excluded when it is necessary in order to secure that justice is done; and (b) that the court hears cases "in camera" in specific cases established by judicial decisions and by statute, Re Millward and Public Service Commission (1975) 49 D.L.R. (3d)

295 (Fed. Ct.). Other than these reasons, no principles of universal acceptance have emerged to justify the exception to an open court.

9. Right to Be Heard by Person Who Decides. It is a well-established principle that "justice should not only be done but should manifestly and undoubtedly be seen to be done." The confirming authority ought to be composed in the same way in both the hearings and the deliberation. Any member(s) taking part in the decision who were not also taking part in all the earlier hearings constitute a denial to the appellant of a fair and judicial hearing, Re Ramm (1957) 7 D.L.R. (2d) 378 (Ont. C.A.). For example, where a Judge, after hearing a case, dies, no other Judge can render a decision upon the evidence. There must in such a case be a new trial so that the Judge deciding the case may hear the evidence, Rex v. Labour Relations Board, Ex parte Gorton-Pew (New Brunswick) Limited Re Canadian Fish Handlers' Union Local No. 4.

10. Right to Reason for Decision. The procedural rules of natural justice do not impose any requirement on tribunals to give reasons for their decisions. However, any tribunal required by statute to give reasons for its decisions must carry out this duty. In one such case Re Morin et al. v. Provincial Planning Board (1974) 6 W.W.R. 291, Justice D.C. McDonald upheld the view that if tribunal proceedings were to be fair to the citizen, reasons should be

given to the fullest practicable extent. The reasons set out must not only be intelligible, but must also deal with the substantial points of fact and law which arise in the case. If a tribunal fails to consider factors which under the statute it is required to consider, then the tribunal would not be exercising its jurisdiction properly (Laux, 1981:594).

11. Interest or Bias. Impartiality on the part of anyone who decides a case has long been established as an essential part of natural justice. Justice requires that a person who is given the power of decision should exercise it in a frame of mind that will permit him to decide impartially and justly (McRuer Report, 1968:76-79). This rule applies with equal force whether the statutes have or have not the express rules against interest or bias. Where a member of a tribunal which is required to act judicially has a pecuniary interest in the matter in dispute, however small, bias is presumed and it matters not whether the tribunal acted impartially or not, The King v. Justices of Sutherland (1901) 2 K.B. 357 at 367.

Remedying Defects on Rehearing. Remedying defects on rehearing addresses itself to the question of whether or not a tribunal is entitled to rehear a case. Sometimes this power is expressly conferred. This express power to rehear may not necessarily confer such a power in an instance where the statute also provides an appeal to the Courts from the

decision being considered for rehearing, Re Martin and Brant County (1970) 1 O.R. 1). In the absence of an express statutory provision, a tribunal cannot change its mind as to its previous decision and cannot hold a trial "de novo," Canadian Industries Ltd. v. Development Appeal Board of Edmonton and Madison Development Corporation Limited (1969) 71 W.W.R. 635 (Alta. C.A.).

Estoppel or Waiver. All rights incorporated in the rules of natural justice are rights which must be asserted by the parties to a dispute. Ignorance of the law, or ignorance of one's rights at the present are not adequate excuses for a person's demanding of a "right" later on in a proceeding. The demand will be estopped on the basis that failure to raise objection to a defect at the first available opportunity does not necessarily give one the right to seek review on those grounds, at a later date. For example, if within a hearing, evidence is introduced to which a party does not object at the time, he will not later be permitted to argue as a ground for judicial review that the evidence should not have been admitted, Regina v. Halifax-Dartmouth Real Estate Board (1964) 44 D.L.R. (2d) 248. Failure to demand the right to cross-examine when the witness puts in evidence may later foreclose a complaint on the ground of denial of cross-examination, Re Bright Rent Tribunal (1950) 1 All E.R. 946. One may later lose the

right to complain about bias in a tribunal when he fails to make timely objections, knowing the facts giving rise to the alleged bias, Canadian Air Lines Pilots' Association v. C.P. Air (1966) 57 D.L.R. (2d) 417.

Doctrine of "Fairness". There has been an emergence of a notion of fairness and good faith involving something less than the procedural protection of traditional natural justice. In a recent case, Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police (1979) 1 S.C.R. 311, Supreme Court Justice Laskin made this point when stating that there was an obligation to act fairly, without regard to the characterization of function. What lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult. To endow some with procedural protection and to deny others any at all would work injustice when the results of the statutory decisions raise the same serious consequence for those adversely affected. Where the doctrine of fairness has been applied in Canadian cases it has been in the context of procedure. "Procedural safeguards" and "procedural fairness" include something less than the conventional natural justice rules. There is a discernible trend in the decisions of the Supreme Court of Canada to examine the conduct of a tribunal's proceedings where a person's rights are affected, in order to determine whether the proceedings were conducted and exercised fairly and in good faith. According to Chief Justice

Laskin, in Arthur Gwyn Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police et al. (1978) 12 O.R. (2d) 337N, even a probationary status in office deserves the minimal protection of good faith and fairness of procedure, however brief the period for which the office was held. The appeal in this case was allowed in favor of the appellant, and Laskin gave the reasons of the Court:

> . . . the formal record indicates that he was not told why he was dismissed nor was he given any notice, prior to dismissal, of the likelihood thereof or of the reasons thereof, nor any opportunity to make representations before his services were terminated . . . he was in law entitled to be treated fairly and there was a corresponding duty on the respondent to act fairly toward the appellant. (Laskin, 1978:2)

Laskin cites that one requirement of "fairness" is the opportunity to make representations (hearing) before one's services are terminated.

The concept of a "duty to act fairly" has been used by judges to denote an implied procedural obligation. There has also been a tendency to assume that a duty to "act judicially" in accordance with the rules of natural justice means a duty to act like a judge in a court of law. According to Supreme Court Justice Laskin, it should be interpreted to mean "to act fairly" rather than to "act judicially," Re Nicholson and Haldimand-Norfolk (1979) 1 S.C.R. 311.

Now, where a statute is either totally or partially silent about procedure, the superior courts hold that "fairness" of procedure must apply. Unlike the traditional principles of natural justice exercised by tribunals entrusted with quasi-judicial functions, "fairness" does not require a

plurality of hearings, etc., nor a total compliance to any of the comparative parts of natural justice. The degree to which there is a duty on a tribunal to conform wholly or partially to the principles of natural justice in coming to a decision will vary according to particular cases and circumstances. A New Zealand appeal case, Furnell v. Whangarei High Schools Board (1973) A.C. 660, has an interesting interpretation of "natural justice." In this case, complaints made against a high school teacher were investigated by a sub-committee appointed under the disciplinary regulations which was to report to the school board. The teacher was not interviewed by the sub-committee nor did he have an opportunity to make representations to the sub-committee or to the school board prior to his suspension. He sought, inter alia, certiorari to quash the decision of the school board. He succeeded at trial but the school board's appeal to the Court of Appeal was allowed. His appeal to the Privy Council from this judgement was dismissed. Lord Morris of Borth-Y-Gest, who wrote the majority reasons, said at page 679:

> It has often been pointed out that the concepts which are indicated when natural justice is invoked or referred to, are not comprised within and are not to be confined within certain hard and fast and rigid rules: see the speeches in Wiseman v. Borneman (1971) A.C. 297. Natural justice is but fairness writ large and jurisdically. It has been described as "fair play in action." Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker, I.J. in Russell v. Duke of Norfolk (1949) 1 All E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each case and the subject matter under consideration.

With the emergence of the doctrine of "fairness" it is no longer necessary to show that a tribunal's functions are characterized as quasi-judicial in order to have the prerogative writs granted as vehicles of judicial review. Judicial review is there to ensure that public bodies exercising powers affecting citizens heed the jurisdiction granted to them.

Application of the Rules of Natural Justice and Fairness to Cases Heard by the Board of Reference. If one follows the traditional approach of determining whether or not the rules of natural justice apply to cases heard by the Board of Reference, it becomes necessary to characterize the functions bestowed on the Board as being either judicial or quasi-judicial in nature.

Traditionally, if the Board of Reference affects the rights of an individual and has a duty to act judicially when carrying out its powers, then the rules of natural justice would be applicable. Boards of Reference powers, cited in section 87 of the School Act, do affect the rights of individuals. In regard to "having a duty to act judicially," the more closely a statutory body resembles the court "stricto sensu," the more likely is it that the body will be held to act in a judicial or quasi-judicial capacity. An application of S.A. De Smith's four tests for the identification of judicial functions simplifies this characterization (S.A. de Smith, 1959:37-51). De Smith's test number one states that the statutory body must be endowed with certain procedural attributes, or

"trappings of a court." According to the powers stated in section 87 of the School Act, the Board of Reference has the most obvious characteristics of ordinary courts. It determines on the basis of evidence and arguments submitted to it disputes between two parties about their respective legal rights and duties, powers and privileges. The second test indicates that the body, after investigation and deliberation, must determine the issue conclusively by the application of pre-existing rules, and other fixed, objective standards, to the facts of the situation. Pre-existing rules are directive in sections 84 to 88 of the School Act and objective standards are directed in section 79 and in section 78 of the School Act dealing with "reasonableness." The third test states that the body's performance of the procedural functions must terminate in an order that has conclusive effect. The body must exercise powers which are not merely advisory, deliberate, or investigatory in nature. These powers must have effect without having to be confirmed by another Board. The power of conclusive effect is granted by section 87(3). The fourth test states that the body, after investigation and deliberation, must make a decision that is final and binding and imposes obligations upon the rights of the individual. Section 87.1(2) states that all Board of Reference decisions have the same force as an order of the court. Any one of these tests by itself is not sufficient to deem the functions of a tribunal as being judicial. All four tests do apply in the affirmative to

the Board of Reference functions. Therefore, the Board may be classified as a quasi-judicial body, and the prerogative writs may be granted as vehicles of judicial review for Boards of Reference decisions.

A more recent trend in the characterization of functions stated that if the tribunal affects the rights of individuals it therefore has a duty to act judicially, and the rules of natural justice would apply. Since the Board does affect the rights of individuals, natural justice would apply.

The most recent trend in the characterization of functions invokes a two-prong test. If (a) the decision affects the rights of individuals and (b) the decision is binding, then the statutory body must exercise consistency and good faith in its procedure. The degree of "fairness" required in the body's procedure may be directly proportionate to the seriousness of the consequence affecting the right of the individual. This "fairness doctrine" may invoke something less than the procedural protection of traditional natural justice. Thus, in the very least, the Board of Reference is bound by the expectation that it would invoke natural justice measures to the degree required by the circumstances in each case, in order to ensure "fairness in trial."

De Facto Procedures Followed by the Board of Reference

Procedures Provided by Statute

Hearing Date. The Board of Reference always follows the directive in section 87(1) of the School Act by setting a date for the hearing of the appeal and notifying both parties. This administrative function is actually coordinated by the office of the Registrar, Department of Education. The assignment of a judge to a Board of Reference is the duty of the Chief Judge of the Alberta Court System.

Withdrawal of Appeal. The Board of Reference always honors an appellant's request to withdraw an appeal at any time, as stated in section 85(2) of the School Act. This means, for example, that a teacher can appeal a termination, can attend the hearings, and produce witnesses and evidence, can even conclude his case, and then decide to withdraw his appeal. However, most withdrawn appeals are settled before an actual hearing takes place. Settlements generally include: (a) a resignation from a teacher and a rescinding of the termination by the school board; (b) some type of letter from the school board indicating a neutral position or a satisfactory report on some aspect of the teacher's work; and (c) in some cases, a sum of money paid by the school board to the teacher. This was the situation at a Board of Reference hearing which commenced on December 9, 1970 (Case #12, Appendix, Boards of Reference Cases). This case

included immediate suspension, and was based on alleged unprofessional conduct and racial discrimination toward the Indian and Metis children at the school. The appellant's unprofessional conduct toward the principal and staff had been detrimental to the orderly function and well-being of the school. A Board of Reference decision was not necessary because an "out-of-court" settlement was reached by mutual agreement between the parties. The Board of Reference did, however, express grave misgivings about the settlement inasmuch as the suitability of the teacher to teach elsewhere was felt by the Board to be highly questionable. In another Board of Reference case (Case #10, Appendix Boards of Reference cases), on July 2, 1971, the Board dismissed the case and actually requested that the teacher and school board get together and reach a mutual agreement. Since then it has become a practise for the legal counsel for both sides to request that the Board of Reference make a decision in all cases. This is reflected in a later case of June 25, 1980 (Case #8, Appendix, Boards of Reference cases), where the Board ordered reinstatement of the vice-principal designation and only suggested that a possible mutual agreement might also be reached, before July 1, 1980.

Jurisdiction. Only after determination of jurisdiction does the Board of Reference go on to a determination of the facts in an appeal.

On July 8, 1976, the Board of Reference refereed a dispute centering around whether or not a superintendent

could appeal his termination to the Board (Case #30, Appendix, Boards of Reference cases). The appellant's position was that his designation of Assistant School Superintendent was a designation within the meaning of section 83(4) of the School Act. He was therefore entitled to put the question of the propriety of the termination of that designation before the Board of Reference for consideration under section 85 of the School Act. The respondent County argued that the Board of Reference had no jurisdiction to deal with this dispute because section 85 limited the Board to deal with disagreements arising between school boards and teachers. In his oral judgement, presiding Judge Kerans commented:

> . . . the document before me . . . the only public offering of this job of assistant superintendent along with that of vice-principal . . . which is by law a teaching position. It is just another job offered to interested persons like that of vice-principal . . . (p. 10). In other words, the office of assistant superintendent is treated as just another teaching post . . . . It is clear, however inconsistent it may be, that the County of (deleted) dealt with Mr. (deleted) at least indirectly as though the office of assistant superintendent was just another teaching post (p. 11). (Kerans, 1976:10-11)

It was therefore established that due to the peculiarities of the contract of employment, the Board of Reference did have jurisdiction. Judge Kerans went on to render a decision:

> . . . the (school) board wrongfully removed his designation . . . because they were obliged to do so in the manner contemplated in section 78 and it is conceded that they have not done so. Accordingly, my order is that the removal of designation is vacated.

> There is nothing to prevent the county from serving (deleted) with a notice of termination and attempting to comply with section 78, in which case you will all be back here again another day. . . . whether their reasons are valid or not, and I really don't know whether they are valid or not, because I have not any idea of what those reasons were if they don't want him as assistant superintendent anymore, perhaps some sort of satisfactory arrangement could now be negotiated by the parties. (Kerans, 1976:13)

On December 8, 1980, a school board launched an appeal to the Board of Reference (Case #32, Appendix, Boards of Reference cases). The issue was whether or not the matter of salary in the order of damages came within the jurisdiction of the Board, when a teacher had been suspended. Counsel for the respondent argued that there was no "dispute" because the teacher did not dispute either his suspension or his termination. The chairman, Justice Bracco, stated that the term "disagreement" in section 85 did include the matter of salary as well as the actual suspension and termination. Section 87(3.1) is supportive of this view, in that the matter of payment of money and the period for which the salary can be paid is specifically included as a power. Justice Bracco ruled that the Board of Reference had jurisdiction to hear the appeal and to consider the substantive arguments with respect to that matter. The appellant was entitled to his salary for a period of six months following his initial notice of suspension.

In summary, it is evident that the jurisdiction of the Board of Reference is a statutory jurisdiction which is

set out in sections 85 to 88 of the School Act, and it is judicial in nature.

Investigation Procedures. After establishing jurisdiction, the Board of Reference traditionally moves on to the inquiry of the facts in the particular situations coming before it. This is its first judicial function. The power to investigate both the procedural and substantive issues in the disputes is expressly granted in sections 87(2) and 87(6).

According to section 87(2), the Board of Reference does, in each case coming before it, make such investigation as it considers necessary, and before making a decision it does give both parties to the dispute an opportunity to be heard. It has been the custom of the Board to conduct a public hearing to which both parties to the dispute are invited. Usually the parties are assisted by counsel. It hears sworn viva voce testimony (Judge Kerans, 1972:1). As applied to the examination of witnesses, this phrase is equivalent to "orally" receiving evidence. Traditionally, the Board takes the view that the burden of proof is on the person who gave the termination notice (Kerans, 1972:1). Therefore it hears the evidence first of the party giving notice of termination, whether school board or teacher, and then the evidence of the party attacking the termination. The hearing is conducted like a trial, with swearing-in, witnesses, evidence, cross-examination and summation. The Board will hear only evidence on the reasons stated in the notice of termination. Thus, it is extremely important that

the notice of termination contain all reasons on which evidence is available.

According to section 87(6), the Board of Reference utilizes its Powers of Commissioner and would not hesitate to summons witnesses to give evidence on oath, orally or in writing, and/or produce documents pertinent to the dispute if such a need arose. To the writer's knowledge, the Board has not thus far needed to enforce the attendance of witnesses, nor to compel them to give evidence and/or produce documents. These granted powers of investigation have effect without needing confirmation from another body. The Board takes seriously the duty to properly exercise its powers of investigation.

Powers of Orders. After investigation and deliberation, the Board of Reference's second judicial function is to make a declaration of the action required to be taken under the relevant rules of law. The Board's decision is final and binding, and imposes obligations upon the rights of individuals. The Board makes such orders as it deems just, but only after finding that a school board failed in its duty.

The Board of Reference often uses its powers to reinstate a teacher. The power to reinstate is not normal in termination cases and is not possessed by judges of ordinary civil courts, since judges only have the power to award damages. For example, on June 15, 1973 (Case #11, Appendix, Boards of Reference cases), the Board ordered that

a teacher be reinstated in his contract of employment.

At times, the Board may find that a "just" order involves the changing of a termination date. For example, on June 25, 1980 (Case #8, Appendix, Boards of Reference cases), the Board ordered that a vice principal designation be restored until the end of the school year.

Although the Board of Reference may decide that a school board acted reasonably in dismissing a teacher, the Board has often ordered a severance payment to the departing employee on the basis that inadequate notice was given. The constitution of adequate notice depends upon the circumstances in each case. The circumstances include the nature of employment, length of successful service and length of the employment contract. For example, in a suspension and termination of designation appeal on February 17, 1972 (Case #17, Appendix, Boards of Reference cases), it was held that the school board be required to pay five months' principal's allowance to the appellant. Although the actual suspension, from the commencement date of suspension to the date of the Board of Reference termination decision, was only one month in duration, the Board took into consideration the number of successful years of service with the respondent school board. The Board has also held that the level of existing opportunities of an employee to gain new employment is a factor, and to be considered in giving a notice of termination.

On occasion the Board has used its powers to award

damages when reinstatement was not appropriate. It heard such a case on February 1, 1979 (Case #15, Appendix, Boards of Reference cases). The appellant was awarded four months' pay in lieu of notice, and his contract of employment was terminated. Since the community had become well aware of the appellant's convictions, the appellant would have been precluded from reasonably carrying out normal teaching duties.

On occasion the Board has also ordered that no salary be paid for a specific period of time. In one case heard on October 30, 1979 (Case #7, Appendix, Boards of Reference cases), the Board ordered that the appellant be suspended without pay, for one year. At the end of the one year the school board was ordered to reinstate the teacher in his contract of employment.

Section 87(3.1) expressly grants the Board to make "among other orders," "all or any" of five orders listed as possibilities for each case coming before it. "Among other orders" implies the rendering of whatever may constitute a "just" order given that the merits of a case may be so peculiar as not to be treated in a traditional sense. To date, no case has had merits so peculiar that the orders have had to fall within the "among other orders" power.

Since June 2, 1981, when a new section 87.1 was assented to, all Boards of Reference orders are in fact filed with the clerk of the Court in the judicial district in which the case proceedings arose. This is a valuable

piece of legislation which will aid in a buildup of available information on the types of cases heard and types of decisions given. Before this legislation came into effect it was almost impossible to get information on Boards of Reference cases heard and decisions given. Often, decisions were given orally, with no court reporter in attendance, so there was no recorded information available. If there was a written decision, it was virtually impossible to locate a copy of the decision. Often, the chairman of the Board of Reference had not retained a copy. The ATA received few of the decisions and those it did have it was not able to share because of "confidentiality." The ASTA worked hard to try to get the decisions, but many school boards would not cooperate in sharing the decisions. Ultimately, the researcher hounded many lawyers' offices and the appellants themselves to get the information needed. It was a trying task indeed.

Procedures Provided by Common Law

Comparative Parts of Natural Justice

1. Right to Notice of Hearing. This aspect of natural justice has been incorporated in sections 87(1) and 87(2) of the School Act. The Board of Reference holds that both parties to the disagreement are entitled to the protection afforded by the audi alteram partem rule. A person must not only be given an adequate opportunity to know the case he has to meet--he must also be given an adequate opportunity

to answer to it (de Smith, 1959:110). In other words, no man should be condemned unheard (Black's Law Dictionary, 1968:166). Traditionally, the Board of Reference has conducted a public hearing to which both parties are invited. Because the Board holds that the terminated party has a right to know the whole case presented against him, the Board has repeatedly stressed that it will entertain evidence only on the reasons for termination which were stated in the Notice for Termination. The Board views as a procedural requirement that a person has the right to be heard by the person deciding the case, before the decision affecting him is made. On June 15, 1973, the Board of Reference, chaired by Judge Kerans, commented on this very point (Case #11, Appendix, Boards of Reference cases):

> . . . the rules of natural justice include the rule that the decision maker must hear both sides, or more precisely, inform the person whose rights are affected of the case against them and afford them a fair chance to answer it. Subject only to compliance with this principle, the actual mode of procedure is not a matter of natural justice, even including whether the hearing be an oral hearing or otherwise.
>
> Thus it could be that the decision maker might decide to hear only written submissions. It might also be that the decision maker delegate to some clerk the duty merely to collect the written material. Also, logically, the decision maker might delegate to another the job of collecting oral submissions and reporting them to the decision maker. In such a case no person affected could complain. Since he has no right in natural justice to an oral hearing he has no right to be personally present at any time before the decision maker. His only complaint would be if the reporter failed to fairly report what had been said to him.

> Thus it is that, in full compliance with the rules of natural justice, the practice has arisen in the United Kingdom and the United States of the holding of public inquiries by a delegate of the decision maker. My understanding is that the duty of such an inquirer includes the collection and reporting of all information. (Kerans, 1973:3-4)

However, the School Act does not grant the Board the express power of delegating to another the job of collecting submissions and reporting them to the decision maker. To date all Boards of Reference decision makers have themselves orally received all submissions.

2. Right to Examine Reports and Other Secret Evidence. Based on all the documentation collected, and the Boards of Reference cases reviewed, the writer believes that all evidence upon which the Board has based its decisions has always been disclosed to both parties to the dispute.

3. Right to Particulars. The practice of Demanding Particulars of the Reasons for Termination has evolved and is being used by both sides (Nemirsky, 1974:9). In some instances, the Boards of Reference have chastised a party for failing to demand particulars. This occurred at a hearing on March 1 and 2, 1973 (Case #4, Appendix, Boards of Reference cases). In the Preliminary Objections hearing, counsel for the appellant alleged that particulars given were not specific and sufficient. The Board found that no order for further particulars was given by counsel for the appellant and chastised counsel for not ordering further particulars on his client. The Board held that it remains the responsibility of the appellant and his counsel to order a Demand for Particulars if they wish further specific information on

allegations stated in the Notice for Termination. This was the case from which the practise of demanding particulars evolved as being acceptable to the Board of Reference. As reasons given by the school board are usually general, it is the board who is served with a Demand for Particulars. The practice allows boards to generalize in the beginning and to give specifics later when a case is being prepared. It is easier to be specific when a case is being prepared for the Board of Reference than when a termination occurs. Interviews with possible witnesses often reveal examples not known at the time the termination was affected.

4. Right to Adjournment. To the writer's knowledge, the Board of Reference has always honored requests to adjournment when the appellant has shown good reason for the request.

5. Right to Cross-Examine. To the writer's knowledge, no Board of Reference has ever refused the opportunity to cross-examine.

6. Right to the Applicability of Rules of Evidence. To the writer's knowledge, the Board of Reference has never had to deal with the inadmissability of any evidence coming before it. To date all evidence received has had some probative value in the circumstances.

7. Right to Counsel. The Board has traditionally held that both parties are entitled to appear in person, and have a right to be represented by counsel. In fact, the Board of Reference has encouraged both parties to be represented by counsel. This was the situation at a hearing on

July 21, 1971 (Case #10, Appendix, Boards of Reference cases). The Board consisted of three members and was chaired by Judge Buchanan. The first hearing was held in Calgary on July 21, 1971, at which time the appellant appeared without legal counsel. The Board of Reference decided (supposedly in all fairness to the appellant) that they should hear the school board's testimony at this hearing and provide opportunity at a later date for the appellant to present his side of the case, after he had obtained legal counsel. The second half of the case was subsequently heard at Olds, on September 25, 1971, at which time the appellant was represented by legal counsel. This practice may seem somewhat unfair to the school board because the appellant had lots of time to consider the evidence presented against him, and to arrange to have the many witnesses appear on his behalf. It is, however, understandable that a lack of legal counsel would be a frustration to the inquiring Board of Reference. Without proficient legal counsel, simple rules of court, rules of evidence, and cross-examination of witnesses would be inadequately exercised.

8. Right to Open Court. Traditionally the Board of Reference has held oral hearings and has conducted these in public. The Board could, however, decide to hold the proceedings "in camera" if it thought that good reason to do so existed. For example, it would be desirable to hold "in camera" hearings in a case involving gross exploitation of either students or teachers because public knowledge of such involvement could make it difficult for the aggrieved parties

to continue living normal lives within their community.

9. Right to be Heard by Person Who Decides. The Boards of Reference have always held that the parties coming before it have the right to be heard by the person(s) deciding the case. In all cases, the confirming authority of the Board was composed in the same way in both the hearings and the deliberation.

10. Right to Reason for Decision. From the documents collected, the writer could not establish if all Boards of Reference cases decided had in fact issued reasons for the decisions. It was especially difficult to establish this for the cases heard before and during the early 1970s, because documents for Boards of Reference cases were kept in many places. There was no one central place that in fact had all documents referring to any one Board of Reference case, either heard or decided. If a written decision stating the reasons did exist, it was virtually impossible to locate a copy of the document. The writer was told by an educator who had been a member of several Boards of Reference that the Board's reasons for decisions were never given just orally. The Board always gave at least one reason in writing for its judgements. This written document was often in the form of a letter to both parties to the dispute. As the 1970s progressed, the writer found that the Boards' of Reference reasons for decisions were easier to locate. These were usually in writing, but if delivered orally, the chairman then took the time to commit to print the reasons given.

Since June 2, 1981, the Board of Reference has followed the legislation of section 87(3.1) and filed its orders in the judicial district Court in which the case proceedings arose.

11. Right to No Bias. By reviewing all documentation available, and by interviewing many people who in the course of their careers came in contact with the Board of Reference, the writer has been able to ascertain that impartiality on the part of all members who sat on Boards of Reference cases has always been upheld. The Boards of Reference have always striven to uphold the principle that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtfully be seen to be done" (de Smith, 1959:140).

Emphasis has shifted from the simple precepts of the law to the more subtle refinements of public policy, as decried by the public at large. "Visible justice" has become an expectation. To date, no Board of Reference decision has had to deal with bias, in neither the evidence brought before it, nor in the composition of the Board itself. It is reasonable for the law to require a greater measure of detachment from the members of a professional disciplinary tribunal, bearing a close resemblance to a court of justice, because the issue at stake is the appellant's livelihood. Even when the Board of Reference composition consisted of three members, bias was never a problem. Now, of course, with the decrease in composition to one member, who is a practising judge, bias is just as unlikely to occur.

Remedying Defects on Rehearing. To date the Board of Reference has been asked to rehear only one case. On

September 5, 1979, the Board of Reference was asked to reopen the hearing of an appeal previously decided by the Board on November 16, 1978 (Case #31, Appendix, Boards of Reference cases). At the 1978 hearing, the appellant had been reinstated in his teaching position. No order, however, had been made in respect of the payment of salary for the period between the termination of employment and the reinstatement of the contract of employment. Subsequent to the issuance of the order of the Board of Reference, counsel for the appellant, by Notice of Motion, applied for an order of the Board of Reference directing that the appellant was entitled to salary for the period of time between the termination of his contract and the reinstatement of that contract. Counsel for the respondent submitted that the Board of Reference, having made its order with respect to the Appeal of the Appellant on November 16, 1978, was now functus officio. The phrase "functus officio" means that once a function has been fulfilled, there is no further authority for the agency, since it has fulfilled the purpose of its creation and is therefore of no further effect (Black's Law Dictionary, 1968:802). Counsel for the appellant submitted that the Board of Reference is empowered to reopen a hearing to permit the calling of new evidence, as no appeal is provided from a decision of the Board. To this, Judge McFadyen commented:

> The jurisdiction of the Board of Reference is set out in sections 85 to 88 of the School Act . . . (p. 2) . . . . The jurisdiction of the Board of Reference is a statutory jurisdiction which arises as a result of an appeal, properly

> taken to the Minister, which is referred by the Minister to the Board of Reference (p. 4) . . . In the matter before me, an appeal was properly filed. . . . and has resulted in an order . . . granting the appellant the relief requested by him at the (1978) hearing. In my view, upon the order being made, the jurisdiction of the Board . . . in respect of the appeal which was filed, was exhausted (p. 5). (McFadyen, 1979: 2,4,5)

Judge McFadyen referred to Texaco Exploration Canada Ltd. v. Mineral Assessment Appeal Board (1977) 1 Alta. L.R. (2d), 39, wherein Laycraft, J. at page 49, stated, "Unless either expressly, or by implication, the enabling statute contains a power to rehear a case before it, a tribunal exhausts its jurisdiction with the first hearing" (McFadyen, 1979:5). Judge McFadyen went on to say that in the case before her, there was no "new evidence," no evidence at all which was not available at the original hearing. There was no allegation that there was any reason why evidence supporting the original application for relief was not called at the original hearing (McFadyen, 1979:12). The Judge continued her explanation:

> In fact it appears that the Board of Reference has jurisdiction (only) in respect of an appeal which has been filed within a limited period of time from the date of termination.
>
> The jurisdiction of the Board of Reference is judicial in nature . . . (p. 13).
>
> The jurisdiction of the Board of Reference was exhausted upon the issuance of the order of November 16, 1978. The Board is "functus officio" and has no jurisdiction to reopen the hearing of the appeal to consider an issue and to grant relief which could have been granted on the original hearing (p. 14). (McFadyen, 1979:13,14)

Accordingly, the appellant's application was dismissed.

Estoppel or Waiver. Boards of Reference uphold the principle that all rights incorporated in the rules of natural justice are rights which must be asserted by the parties to the dispute. In several cases, the Board has refused to entertain argument objecting to defects which a party had failed to object to at an earlier available opportunity. One such situation arose at a Board hearing on May 21, 1980 (Case #3, Appendix, Boards of Reference cases). The Honourable Mr. Justice Holmes applied the principle of estoppel to the appellant's concern of irregular form of notice. In the Reasons for Judgement, Justice Holmes stated:

> In considering the merits of such an appeal it is the function of the Board of Reference to review the reasons given by the respondent in its termination notice and to weigh the adequacy of the respondent's actions and to determine whether the respondent acted reasonably in the circumstances.
>
> It was not argued that the form of the termination notice was irregular. The notice clearly set out that the decision to terminate the appellant's failure to comply with a lawful order of the respondent (school) Board issued on June 20, 1978. Particulars had been delivered to the appellant's agents with a letter dated May 11, 1979. On the evidence, I have no difficulty in finding that the appellant had ample notice of the respondent's complaint in sufficient time to prepare his submission at the termination hearing on May 29, 1979. (Holmes, 1980:3)

Failure to raise objection to the defect of irregular form of notice at the first available opportunity, which was the termination hearing of May 29, 1979, was sufficient ground to estopp the appellant from seeking review on this same ground on May 21, 1980.

Doctrine of Fairness

1. Board of Reference Level. The Board of Reference practises both good faith and fairness of procedure in reaching its decisions. The Board extends the same fairness of procedure to both appellant and defendant in the cases coming before it. In the conduct of its proceedings it has conformed to the rules of natural justice to the extent required in each particular case to ensure that each party to the dispute had a fair chance to present their case.

2. School Board Level: Test for Reasonableness. The Board of Reference also expects that good faith and fairness of procedure be applied at the school board level when contracts and/or designations are suspended and/or terminated. Section 78(2) requires of the school board that whenever the statutory notice of termination is used, the board shall act reasonably. This review of "reasonableness" is conducted by the Board of Reference.

The test for reasonableness consists of three requirements. Firstly, the reasons for termination must exist in fact. Secondly, the school board must itself make an inquiry as to the facts. Thirdly, the adequacy of the facts in each case is carefully weighed as to their "reasonableness." Reviews of adequacy are of two kinds: (a) where the teacher's conduct is the basis of the reasons; and (b) where teacher conduct is not the basis of the reasons for termination (Kerans, 1972:8). In the Manitoba case of Erlund v.

Quality Communication Products Ltd. et al. (1972) 29 D.L.R. (3d) 476, Wilson, J. of the Manitoba Queen's Bench states that "what is 'reasonable' depends upon the circumstances of the case. . . ." The Board of Reference fully endorses this statement by the practice of deciding each case on its own merits, and diligently applying the test for "reasonableness."

The Board has always acted on the assumption that a school board could never be said to have acted reasonably if the reasons given for its actions do not exist in fact. Evidence is allowed only on the reasons stated in the Notice of Termination. If the school board fails to convince the Board of Reference that the reasons given existed in fact, the termination will be set aside. In one Board of Reference case heard on July 8, 1971 (Case #1, Appendix, Boards of Reference cases), it was held that there was insufficient evidence to support the grounds on which the school board was basing its termination of contract, and the termination was set aside.

In regard to the second test for reasonableness, the Board of Reference has held that a school board acting reasonably must itself make an inquiry as to the facts. No such inquiry would reasonably be adequate without hearing what the teacher had to say. The Board has repeatedly emphasized that in the same manner as it adheres to the audi alteram partem rule in its own process of inquiry, so too should the school board adopt the practice. So far, the Board of Reference has had to contend with three issues

relating to the audi alteram partem rule at the school board level. The issues were that: (a) the teacher must have an adequate opportunity to answer to the case against him; (b) the teacher has a right to be heard by the person(s) deciding his case; and (c) the meaning of a "hearing." Each of these issues is explained in the following separate paragraphs.

The Board of Reference case decided on February 21, 1972, has become the test case for the issues of whether or not the teacher must have an adequate opportunity to answer the case against him (Case #20, Appendix, Boards of Reference cases). The three-member board was chaired by retired Chief Judge Nelles Buchanan. This was an appeal from one female person, on the basis of alleged neglect of duty in failing to report for work after the Christmas vacation, without lawful excuse. The Board had denied her request for Leave of Absence without pay to take a skiing holiday, as a part of her honeymoon. Apparently, the appellant had proceeded with her holiday plans, notwithstanding the school board's refusal to grant her the absence without pay. She did notify the principal of her school about her intentions, and had requested a substitute teacher for the period of her holiday, January 24 to 28, 1972. On Monday, January 31, 1972, the appellant received by hand, a letter informing her of contract termination effective March 3, 1972. The Board of Reference held that the school board had failed to act reasonably pursuant to section 78(2) of the School Act, by terminating her contract without affording her the

opportunity to be heard. The school board appealed this decision to the Supreme Court of Alberta, Trial Division. They applied for an application in the nature of certiorari to quash the Board of Reference Decision. On behalf of the school board it was argued that it was erroneously assumed by the Board of Reference that the Board of Trustees had been acting in either a judicial or quasi-judicial capacity. The Board of Reference had therefore erred in deciding that the trustees were bound by the rules of natural justice. In giving the decision on August 31, 1972, Lieberman stated:

> The School Act, supra, and particularly section 76 thereof as applied in this case, imposes upon the Board of Trustees when considering this matter, the obligation of dealing with the rights of an individual, and when dealing with those rights, the Board of Trustees is exercising at least a quasi-judicial function . . . . The board is acting in the least as a quasi-judicial body and as such must observe the rules of natural justice. (Lieberman, 1972:2)

The school board's application for certiorari was not granted. Since this judgement, school boards have recognized that an adequate opportunity to answer to a case is a requirement of "reasonableness."

Two Boards of Reference cases addressed themselves to the issue that a teacher has the right to be heard by the person(s) deciding the case at the school board level. On July 7, 1972, one female person appealed her termination of contract on alleged grounds of incompetence and lack of student rapport (Case #21, Appendix, Boards of Reference cases). Counsel argued that no opportunity to be heard had been afforded to the teacher by the school board before the

termination had been decided. Apparently, it was the school board superintendent who had heard the teacher's side of the dispute. The three-man Board of Reference chaired by retired Chief Justice Buchanan allowed the teacher's appeal, and ordered reinstatement. It held that the inquiry by the superintendent was not sufficient for a proper opportunity to be heard for the teacher. It was necessary in this case for the school board to have heard the teacher, because it was the board and not the superintendent who had the authority to terminate the teacher's contract of employment. This same predicament was the ground for argument in the case heard on June 15, 1973 (Case #11, Appendix, Boards of Reference cases). In this case, prior to the contract termination, the trustees of the respondent school board delegated to its superintendent the power to terminate a teacher, "subject to confirmation by the conference committee of the school board." The superintendent prior to the actual termination gave the appellant a hearing. The conference committee of the school board, prior to confirmation of the decision to terminate, did not in any form give the appellant notice of the case they heard against him, nor gave him any opportunity in any form to answer to the case, other than the hearing with the superintendent. Presiding Judge Kerans held that in this case the superintendent was not merely a reporter of the teacher's submissions, but had clearly been charged with the responsibility to form an opinion on the dispute. The superintendent's inquiries, in Keran's view,

had to be taken as having been directed to that end, and not merely to the end of collecting data for consideration by the conference committee. Because the real power of decision for termination rested with the conference committee of the school board and not the superintendent, this hearing procedure offended against the rules of natural justice. The teacher was reinstated in his contract of employment. Since these cases, school boards have been very careful to grant hearings with the person(s) who in fact does have the express and final power to terminate a contract of employment or designation.

One Board of Reference case, and two appeal cases, addressed the issue of the meaning of a hearing, and the allowable form of a hearing. In the Board of Reference case #11, discussed in the previous paragraph, presiding Judge Kerans went on to say that a decision maker might decide to hear only written submissions. In his opinion it was permissible for the decision maker to delegate someone to collect written or oral submissions and to report them to the decision maker. Since a person has no right in natural justice to an oral hearing, the person has no right to be personally present at any time before the decision maker (Kerans, 1972:3,4). A reviewing of written submissions, by the decision maker also constitutes a hearing. The first appeal case addressing this issue was decided on February 8, 1974. The reasons for the judgement in the case Regina Ex Relatiore Rudy Penner Applicant, and the Board of Trustees of the Edmonton School District No. 7, Respondent were given

by Mr. Justice Cavanagh. The school board had granted a hearing date to the appellant and had specified that the hearing would be "in camera." Before the appeal actually took place, the teacher applied for an application in the nature of mandamus to be directed to the respondent to hold the hearing in public. Mr. Justice Cavanagh, in dismissing the application, emphasized that the relationship between the parties was one of master and servant and that under common law the contract of service would be terminable by either party. Section 76 of the School Act merely placed certain restrictions on the school board as master. Mr. Justice Cavanagh stated:

> I believe that the school board is going much further than it needs in holding a hearing. I believe to act reasonably as required here is to make adequate inquiries of credible persons and to act without bias or to act in good faith . . . this is not a Board sitting as a tribunal to decide between two parties. This is a master trying to decide whether to dismiss a servant. (p. 3) . . . this is not a tribunal deciding a case before it. It is one party to a contract trying to decide if he has the legal right to terminate it and the statute requires him to act reasonably in reaching that decision. (p. 4) . . . the proposed hearing is an investigation of the board's legal position, not a weighing of an issue between the parties. (p. 5) (Cavanagh, 1974: 3,4,5)

Cavanagh implies that at the inquiry only the possible grounds for termination are investigated. The actual decision to terminate does not occur at this hearing. The actual decision to terminate or not terminate is not made until after the inquiry has been completed. If the master decides, after the inquiry, that he has the legal ground to terminate and in fact proceeds to act on his legal right to

terminate the contract, only then can the servant seek the remedies provided by statute. In this particular case, the actual termination decision had not yet been made, so in effect the teacher at that point in time had no legal right of appeal to exercise. Mr. Justice Cavanagh continued his explanation:

> . . . in my view the (school) Board has gone much further than required and has confirmed to the requirements of natural justice . . . . The decision to hold the hearing in camera is sufficient . . . when you consider that this hearing is an inquiry to determine whether the board should decide to dismiss or not. (Cavanagh, 1974:7)

In effect, Cavanagh is saying that an inquiry of some form is necessary by statute. Whether the hearing is oral, or in written submission, is at the pleasure of the school board to decide. If the hearing is oral, it is, again, at the pleasure of the master (school board) and not the servant (teacher) to decide whether to hold the hearing "in camera" or "in public." Cavanagh's judgement dismissing the application for mandamus was appealed to the Appellate Division of The Supreme Court of Alberta. The case, Re Penner and Board of Trustees of Edmonton School District No. 7 (1974) 46 D.L.R. (3d) 222, was decided on June 11, 1974. Again, it was an application in the nature of mandamus requiring the respondent to hold the hearing in public, where the holding of a hearing in such cases either "in public" or "in camera" was not required by government statute. The Court held that having voluntarily agreed to hold a hearing, the school board must observe the rules of natural justice in holding

it. These rules would be fulfilled if: (a) the school board advised the teacher of the "charges" against him; (b) provided him with all documentary evidence in support thereof; (c) invited him to attend the hearing; (d) allowed him to be represented by counsel; (e) allowed him to call witnesses; and (f) allowed cross-examination of witnesses called by the school board. Since the school board in this case had given notice to the teacher that there would be a hearing, held in camera, it was now up to the teacher to decide whether or not he would exercise his right to appear before the decision-making inquirers. The Court further ruled that the rules of natural justice did not require a hearing in a case like this to be conducted in public. There is, in fact, nothing in the School Act which specifically requires that a school board should conduct a hearing in a matter of this type either in public or otherwise.

In regard to the school board's responsibility to act "reasonably," it seems it is irrelevant whether the teacher actually attends the inquiry. So far, the Board of Reference has been satisfied if it is shown that: (a) the teacher knew about the possibility of termination; (b) the teacher was invited to attend a board meeting inquiry into the possibility of termination; (c) the teacher was advised as to the alleged reasons for termination; and (d) the teacher was given the opportunity of responding to each of the reasons at the board meeting.

In regard to the third test for reasonableness, it is required that after determining what the facts are, the

Board of Reference must then weigh the adequacy of the facts by the same test of reasonableness (Kerans, 1972:9). Reviews of adequacy are of two kinds: (a) where the teacher's conduct is the basis of the reasons; and (b) where teacher conduct is not the basis of the reasons. In both situations, the law of employment, previously referred to by Judge Kerans is the master-servant relationship, requires that reasonable notice for termination be given to the employee. This does not apply in cases of gross dereliction of duty giving justified cause for summary dismissal (Kerans, 1972:4). If, at common law, an employer wishes to terminate the employment, he is required to accommodate the worker so that the worker does not suffer undue financial hardship. This is accommodated by either the giving of reasonable notice, or severance pay in lieu of, to the employee. What is "reasonable" notice is dependent upon the merits of each case. The first type of review of adequacy of facts is in the case where teacher conduct is the basis of the reasons for dismissal from employment. His Honor Judge Stevenson commented on this in a Board of Reference decision of September 2, 1977 (Case #2, Appendix, Boards of Reference cases):

> In determining appeals from a school board where the decision is attacked on the merits as distinct from technical grounds, the issue for me as a referee is to determine what are the reasons for dismissal, what are the facts, and whether these facts constitute a proper ground for termination. (Stevenson, 1977:1)

The second review of adequacy of the facts is the case where teacher conduct is not the basis of dismissal. This

situation has been referred to as "staff reduction." It is a difficult area for the Board of Reference as the extent of its jurisdiction in this area is questionable. Nowhere does the School Act state that a teacher's contract may be terminated simply because his/her services are not needed, and economically not feasible for the school board. Perhaps this situation is inferred in section 78(2) of the School Act in the phrase, "shall specify the reasons for termination and in each case the (school) Board shall act reasonably." The Board of Reference has found that it is reasonable for a school board to terminate a teacher who is simply not needed. The Board of Reference has limited its enquiries in such cases to whether or not the school board acted in "good faith," without questioning the educational policies established by the school board. One such case was decided on August 8, 1977 (Case #27, Appendix, Boards of Reference cases). The reason for termination in this case was because of a staff reduction brought about firstly by declining enrollment and, secondly, because the board was involved in a long-range plan which was in implementation and had a community involvement which affected its budget. To this, the presiding Judge commented:

> The reason was a staff reduction and this was, in my view, a valid reason as it related to the implementation of a philosophy of the board. I am satisfied that the board could not do this, in light of the facts of this particular case, by natural attrition and that a criteria had to be set up. Therefore, it was incumbent upon the school board to act reasonably in setting up this criteria as the criteria related to the

> termination. To act reasonably, it is in my view, to act in good faith and on its policy. There must be reasonable grounds for termination. I am satisfied that the board acted on its policy and it is not the role of this Board of Reference to review the policy decision. There was no malice here as towards Mrs. (deleted) and therefore, there is no bad faith. The criteria was set up in good faith . . . (p. 10). The board acted in their best interest consistent with their philosophy and I am satisfied that it was . . . a good sound business decision (p. 11). (Case No. 27, 1977: 10-11)

The termination of contract was upheld, and no payment of damages was awarded. In particular, the procedures a school board follows in arriving at the decision is examined very carefully and closely. The Board of Reference does not concern itself with either "which teacher will go when there is a surplus," or with "what criteria is used." The Board, to date, appears to be more concerned with the animus behind who is to be eliminated. This is a determination of "good faith." It is felt that if it is shown that the school board used the staff reduction reason as a cover-up for other possible dissatisfactions and reasons for dismissal, the Board of Reference might rule that the school board did not act in good faith when reducing staff. The termination might then be set aside.

Observation of Cases Heard. The writer had the opportunity to view seven Boards of Reference hearings from 1977 to 1980, and was impressed with the presiding Judges' high expectations of proper courtroom procedures, and enforcement of those expectations. All seven hearings

were conducted like trials, with swearing-in, witnesses, evidence, cross-examination, and summation. The court rules of evidence and the right to cross-examination were expertly applied by counsels for both parties. When rendering their decisions, the Judges did give a summation of the cases, and their reasons for rendering the particular decisions. Written reasons for the decisions were also available. This is most desirable because with no written reasons for judgements, it is most difficult if indeed not impossible to seek judicial review of a decision.

Does the Board of Reference Measure Up to the Requirements of Law in Terms of Procedure?

The Board of Reference has established itself as an ensurer of procedural fairness. The Board fully exercises the powers and duties provided by statute. The Board incorporates the rules of natural justice to the extent needed, dependent upon the circumstances of each case and the subject matter under consideration, to ensure a fair hearing for both parties to the dispute. In so doing, the writer believes that the judges sitting as the Board of Reference interpret their duty to "act judicially" in accordance with the rules of natural justice, to mean that they are to "act fairly." The writer also believes that they interpret the concept of a "duty to act fairly" not to denote a "set" implied procedural obligation, but rather an obligation to see that the procedure in each set of circumstances is adapted

to ensure a fairness of procedure to both parties to the dispute.

Grounds for Board of Reference Decisions

Contracts of Employment

Technicalities of Allowable Date. The Board of Reference takes the position that a school board, when terminating a teaching contract, must comply with the technicalities of allowable date for termination as set out in sections 78(1) and 81 of the School Act, in order that the Board has jurisdiction to hear the appeal (Nemirsky, 1974:2). Non-compliance is fatal to a school board's position and renders a notice of termination void.

In a case heard on July 26, 1971, the Board made it clear that the technical requirements of the School Act must be followed in the issuing of a notice of termination of contract (Case #13, Appendix, Boards of Reference cases). The notice of termination had apparently been mailed at approximately 5:00 p.m. on May 31, and the post office closed at 5:45 p.m. The appellant had no opportunity to sign for the double-registered letter until June 1. This violated the provisions of section 81 of the School Act, which states that a notice of termination cannot be given in the 30 days preceding a holiday of 14 or more days' duration. The notice of termination was therefore a nullity, and the teacher's contract of employment remained in full force and effect.

Notice of Termination and "Reasonableness." Section 78(2) dictates that the Notice of Termination must specify the reasons for the termination, and that the school board must be "reasonable" when terminating and/or suspending a contract of employment. The Board of Reference traditionally allows evidence to be presented only on the reasons stated in the Notice of Termination, and reviews the adequacy of the facts in favor of the dismissal accordingly. As mentioned previously in this study, although the Board may decide that a school board has acted reasonably in dismissing a teacher, the Board has often ordered a severance payment to the departing employee on the basis that inadequate notice was given.

Teacher Conduct Not Basis for Dismissal. Two cases dealing with termination of teaching contracts, due to the reduction of professional staff, were heard on April 21, 1971. Retired Chief Judge Buchanan presided over both cases. The merits of each case were considered. This resulted in one case decision going to the favor of the teacher, and the other going to the favor of the school board. The first case was an appeal from one male person whose contract had been terminated because a decrease in student enrollment at a particular school was forecast for the next school year (Case #5, Appendix, Boards of Reference cases). This prompted the school board to reduce the professional staff at the school. The decision to terminate this particular teacher was made on the basis of least seniority.

This, in turn, was based on the date of the acceptance of employment by the teachers with least seniority. This termination was set aside by the Board of Reference and the teacher was reinstated. The termination of employment was held to be unreasonable solely on the ground that the school board acted without having sufficient indication as to the teaching staff status at the end of May. In this particular instance, notice of termination was given in March, before there was sufficient indication of forthcoming teacher resignations. It was recommended that such terminations be held off until late in May, at which time it may be found that due to various factors it may no longer be necessary to serve such notice. The second case was an appeal from one male person whose contract had been terminated because a reduction in professional staff was due to a new staff-utilization program which eliminated his position of teacher-librarian (Case #6, Appendix, Boards of Reference cases). He was employed as a teacher-librarian with duties as a librarian, and duties as a teacher in teaching a course in library science. The school board authorized the implementation of a staff-utilization program which allowed for the replacement of a teacher-librarian with a library technician. This termination of contract was upheld. The Board of Reference took note of the technicality that the nature of employment in this case was not the usual classroom teacher employment. In as much as the role for which the appellant had been employed was being abolished, the school

board acted reasonably in serving notice as it did, on March 11, 1971. This gave the teacher generous time in which to obtain other employment.

In cases where the school boards have allowed the teacher an effective opportunity to be heard and the teacher failed to take advantage of the opportunity, the Board of Reference has held that the school board had done all that was necessary. This was noted at the Board of Reference hearing on Jun3 25, 1973 (Case #22, Appendix, Boards of Reference cases). Due to decreased enrollments, it was necessary to reduce teaching staff in a particular school. In particular, it was necessary to reduce teaching time in both chemistry and biology. Although the chemistry teacher was retiring, the biology teacher had no training in chemistry. Because a combined training was now the most suitable arrangement, the School Committee had authorized the Superintendent to hire a teacher with academic background in both chemistry and biology. Thus, the biology teacher's contract was terminated. In giving oral judgement, His Honor Judge Kerans commented on the role of the Board of Reference in this type of case:

> The duty of the School Committee is to act reasonably, and in cases where the decision to terminate is based upon reasons having nothing whatever to do with the competency or the conduct of the teacher, I am satisfied that the duty of this Board is not to become a second-hand Board of Trustees for a school board, determining policy questions, but merely to determine that the termination decision was in fact based on policy and that any policy consideration was not a sham--in short, that the employing board acted in good faith. (Kerans, 1973:1)

> I am satisfied that the school board in making the decision to solve the problem they had in the school in the way they did was acting in good faith, and that these were real policy considerations and that they were reasonably convinced that their solution was the best solution and I do not think it would be appropriate for me to inquire further into that. . . . in the appropriate set of circumstances such as here, it is reasonable to terminate a teacher because of lack of the necessary specialized training. It, however, might not be reasonable in other circumstances. (Kerans, 1973:2)

In this case, the appellant had failed to avail himself of the opportunity to attend the inquiring board meeting prior to his termination. The teacher suggested for the first time, at the Board of Reference hearing, that he should have been given the opportunity to train himself for the new job requirements. To this suggestion, Judge Kerans commented:

> I have indicated that if the teacher had suggested this alternative that he now suggests, back in May, I would be prepared to say it would have been unreasonable for the School Committee not to try to work that out with him. (Kerans, 1973:7)

The school board hearing which the teacher failed to attend had in fact been scheduled for early May. In effect, Judge Kerans chastised the appellant for not attending the hearing. Judge Kerans went on to say:

> I therefore express the hope that now, notwithstanding the lateness of his suggestion, it can yet be worked out. I express that hope because I accepted the school board's statement that these problems were the only reason for the decision to terminate. (Kerans, 1973:7)

Notwithstanding this benevolent expression, it was held that the school board had acted in good faith and in accordance with the School Act. The termination was upheld.

On September 18, 1973 (Case #29, Appendix, Boards of Reference cases), the Board heard a staff reduction case involving five appellants. The five appellants constituted the entire full-time teaching staff of a school which was closed for economic reasons. The appellants conceded that the respondent board acted reasonably in its decision to close the school but unreasonably in giving inadequate notice of termination. Presiding Judge Belzil noted that one of the facts to be considered in determining what is reasonable notice is the availability of similar employment having regard to the employee's experience, training and qualifications. In this case, the employment situation was further aggravated by the declines in school enrollments resulting in a surplus of qualified teachers throughout the province (Belzil, 1973:5). Judge Belzil found that for the most senior appellant, reasonable notice would have been nine months, and that six months would have constituted reasonable notice for the remaining four appellants. In the first instance, the appellant was entitled to damages equivalent to nine months' salary less any amount which he had earned or would hereafter earn in any employment. In the second instance, two appellants were awarded damages equivalent to six months' salary less the amount they would earn hereafter in their employment. Two appellants were awarded no damages because they had made no attempts to mitigate their losses. Damage orders should not be considered as judgements against school boards. Such orders are merely a compensation for

the employee. There is always a possibility of severance pay no matter how reasonably a school board may have acted. It is a rule of law that in order for an employee to qualify for severance pay, he must make every effort to find another job and thus mitigate any loss due to termination.

Teacher Conduct Basis for Dismissal. Where teacher conduct is the basis of termination, the Board permits termination only in those cases where summary dismissal would be allowed at law, as stated in section 79.1 of the School Act. These would include: (a) gross moral turpitude such as would render a teacher unfit for his post; (b) dereliction of duty and incompetence; (c) refusal to obey a lawful order of the Board; (d) poor colleague relationship and insubordination; and (e) lack of discipline and unreasonable punishment. One or more of the grounds stated in section 79(1) must be present before a school board is able to suspend a teacher pursuant to section 79. Generally this section is used when criminal charges have been laid and there has been no trial of the charges. A teacher is suspended pending the outcome of the criminal matter. If convicted, the teacher will be terminated because of the conviction. If not convinced, the teacher is usually returned to the classroom and the suspension ended.

One example in the first instance, moral turpitude, was heard February 1, 1979 (Case #15, Appendix, Boards of Reference cases). The appellant was initially suspended on

about September 1, 1978, and after a school board hearing, he was served with a Notice of Termination effective November 24, 1978. The appellant was appealing his termination. It is not necessary to appeal a suspension because the school board decision to terminate has not yet been made. A teacher is paid during a period of suspension. In this case, counsel for the appellant argued that the offense of having stolen property in his possession had already been dealt with by the Court, which had granted a conditional discharge on the matter. Presiding Judge Holmes concluded as follows:

> . . . from considering the facts as brought out in the evidence the school board did act reasonably under the circumstances. I make this finding on the criminal offence alone. And, notwithstanding that the possession of stolen property arose out of the Appellant's medical problem, the board had as its primary duty the responsibility for the operation of the local school system. Whether the students were justified or not, knowledge of the thefts and related conviction precluded the Appellant from reasonably carrying out his normal teaching duties in the (deleted) area. This consideration overrides any suggestion of a leave of absence for medical reasons or the relatively minor nature of the crime, and the fact that the Court saw fit to give the Appellant a conditional discharge. (Holmes, 1979:5)

The suspension and termination decisions were upheld.

An example in the second instance--dereliction of duty--was also decided in favor of the school board on March 26, 1976 (Case #18, Appendix, Boards of Reference cases). Judge Kerans explained his decision as follows:

> . . . the classroom performance of the appellant was not satisfactory to his employers and that in a number of schools he had not effectively guided and directed the learning process for a substantial number of students. (Kerans, 1976:7)

> . . . he must have known he was deliberately flouting the essential conditions of his contract. Indeed, in the circumstances I can only understand his behavior as a declaration of war on his employers. Because he was quite capable of different behavior and because he behaved this way out of a conviction that he knew better than his employers, his behavior at (deleted) School was wilful, and wilful disobedience justifying summary dismissal in the ordinary case and providing reasonable grounds for a statutory termination under the School Act. (Kerans, 1976:12)

This judgement follows the explication Judge Kerans gave at a leadership course for school principals in Edmonton, four years earlier. At that time, he had said:

> I think it is fair to say that the Board of Reference . . . has not insisted on any higher standard of conduct in this regard than what the ethics of the profession require and the overwhelming majority of teachers take for granted. (Kerans, 1972:10)

Incompetence has been a rather difficult reason to establish in fact. To Judge Kerans, competence denoted the capability to do the required work. Lack of effort as opposed to inability, was dereliction of duty, not incompetence (Kerans, 1972:11).

On July 23, 1973, the Board of Reference upheld a termination based on incompetence (Case #19, Appendix, Boards of Reference cases). The school board had not been satisfied with the way in which the teacher had performed during the past school year. Evidence was heard on the reasons

stated in the Notice of Termination, namely, problems with classroom discipline and inadequate lesson planning. Such specific reasons were easier to prove, than would be the word "incompetent." The Board of Reference had been convinced in this case that the proper personnel had been able to adequately evaluate the teacher, and that steps had been taken in an attempt to assist the teacher in improving on the specific, cited reasons for termination. Apparently, the Board was satisfied that the teacher either did not take appropriate steps for improvement, or was simply incapable of improvement. When alleging incompetence, whether meaning a lack of ability or a refusal or failure to carry out instructions, it is necessary to look at the overall aspect of a teacher's performance. Although incompetence is, of course, a cause of dismissal, adequate notice is required. Suspension might be warranted only if the incompetence is gross to the point where it causes great severity in the total job performance. To date, the Board of Reference has not been faced with having to determine the facts of such a situation.

An example in the third instance, refusal to obey a lawful order of the school board, was decided on July 7, 1971 (Case #26, Appendix, Boards of Reference cases). The appellant was a shop teacher who had begun the construction of a house for another teacher in the shop of a composite high school. The school board ordered the shop teacher to cease work on the project and to remove all materials from

the school. The appellant ignored this order, which was delivered personally by the chairman of the school board, and in so doing used abusive language. The Board of Reference upheld the termination of contract. The burden of proof for "just cause" for termination has thus far rested on the school boards, since it is their actions that have been challenged before the Board of Reference. Adequacy of facts is established only on the evidence presented to the Board of Reference. This evidence is then considered in light of the circumstances of each case.

On May 21, 1980, the Honourable Mr. Justice Holmes rendered a decision on an appeal to the Board of Reference from a termination of contract based on the premise that the teacher had failed to comply with a lawful order of the board (Case #3, Appendix, Boards of Reference cases). This order was a directive stating a need for specific improvements on the part of the teacher. Justice Holmes stressed that the Board entertains arguments from both appellant and respondent, only on the reasons stated in the Notice of Termination.

> The Notice of Termination to the appellant dated May 29, 1979, was based upon the alleged failure of the appellant to comply with the terms of the respondent's directive on June 20, 1978. The issue in this appeal is to determine if the facts support the respondent's reasons for termination and, if so, whether the respondent acted reasonably in the circumstances. (Holmes, 1980:6)

Justice Holmes went on to deliver his judgement:

> . . . I find that the appellant's overall compliance with the directive was unsatisfactory and it follows therefore that the respondent did act reasonably in reaching the decision to

> terminate the appellant's contract of employment. (Holmes, 1980:13)

It was also ordered that the teacher be paid two months' additional salary. This was based on the fact that the teacher had served the school board for twelve years, did not show unwilful defiance in regard to complying with the terms of the respondent's directive, and that most teaching positions for the ensuing school term would have been filled by June 1, 1980. Justice Holmes reasoned that under the circumstances the appellant was entitled to more notice than he had in fact received.

Although there appears to be an increase in the number of cases citing poor colleague relationships and insubordination as reasons for termination, only two cases will be reviewed. On January 12, 1973, the Board of Reference heard a case (Case #28, Appendix, Boards of Reference cases), that cited the appellant's failure to establish reasonable working relationships with her colleagues as the reason for termination of contract. The evidence showed, in the opinion of the Board of Reference, an emotional and unstable teacher. Evidence also indicated that the teacher blocked out what the teacher did not want to hear, and this caused much frustration for others. The teacher appeared to be the common denominator in staff conflicts. The teacher had been transferred on several occasions and experienced the same difficulties in each school. It was ruled that the school board acted reasonably in terminating the contract, because in the Board's opinion, a teacher need be a stable,

mature, cooperative person as well as competent in the classroom. It was also held that under the circumstances prevailing, the one month notice given on December 13, 1972, was not adequate. The school board was ordered to pay an additional two months' salary in lieu of notice.

A Board of Reference hearing on October 30, 1979, resulted in an unusual decision (Case #7, Appendix, Boards of References cases). The appellant's contract was terminated during the month of August, 1979, and was confirmed by the school trustees at a meeting in the latter part of August, 1979. The termination was effective on September 4, 1979. The decision to terminate was on two grounds: (a) insubordination; and (b) the undermining of the authority of the school board. In his judgement, Mr. Justice Wachowich stated:

> I'm satisfied that the appellant is a problem teacher, but he is not necessarily . . . an insubordinate one or one who was undermining the system. (Wachowich, 1979:11)

He went on to say:

> The board, I'm satisfied may have acted in good faith, but did not, in my view, justify a summary dismissal in law . . . . I'm satisfied that the law is such that the conduct of the teacher must be such that a summary dismissal is only justified where his conduct for dismissal is the same as the legal concept for dismissal. (Wachowich, 1979:15)
>
> There are not sufficient grounds, in my view, for termination, but there are certainly sufficient grounds for other punitive measures. (Wachowich, 1979:16)
>
> In my view, discipline rather than termination would be a reasonable measure and would in this case and should be substituted for the termination of the appellant's services. I come to

> this conclusion by simply finding both parties were to blame. . . . I order as follows: that the appellant's services be set aside and that he be suspended from this time to September 1, 1980, with reinstatement into the system as of that date with no salary beyond that paid to him to date. And secondly, there is a condition attached that during this period of time, the Appellant is to refrain from making public comment or being involved in the Respondent school board affairs or from any public participation in the school board affairs until the date of reinstatement September 1, 1980. (Wachowich, 1979:17)

This was an unusual decision in that the teacher was suspended by the Board of Reference, without pay, for one year. At the end of the one year the school board was ordered to reinstate the teacher in his contract of employment. In a case of this nature, it is fairly reasonable to expect that both the teacher and the school board might desire some type of mutually acceptable "out-of-court" settlement long before the one year suspension is over. For example, the school board might offer the teacher several months' salary as severance pay, in exchange for a letter of resignation from the teacher, effective for the date on which his employment contract was ordered to be reinstated. There is nothing in the School Act to prohibit any satisfactory, mutually acceptable settlement of any issue between two parties. Some people feel that such "without-prejudice settlements" should not be allowed. The argument is that it is against the public interest that teachers who are unsatisfactory should be allowed to continue to teach (Kerans, 1972:2). The School Act presently views the matter simply as an issue between two parties, without any involvement of the public interest.

There is provision in the School Act for withdrawal of an appeal and of a notice of termination at any time, right up to the time that a decision on the appeal is actually being handed down to the parties. In the same instance, there is no provision prohibiting both parties from reaching a mutually acceptable agreement after an order has been handed down, which in fact may be quite different from the order itself.

In the fifth instance of dismissal, lack of discipline and unreasonable punishment, three cases are described. On July 8, 1971, the Board of Reference refereed a case citing lack of discipline (Case #1, Appendix, Boards of Reference cases). This was a case of a male person who had been employed as a physical education teacher by the respondent school board for a period of twelve years. His contract had been terminated for the following reasons which were stated in the Notice of Termination: (a) your conduct in matters of discipline have resulted in completely unsatisfactory relationships with students; (b) your conduct has been such that you have failed to maintain the confidence and respect of the parents of children in your classes; (c) your presence on staff has created and creates unnecessary administrative problems; and (d) your presence is having a detrimental effect on the morale and school spirit in this school. During evidence, it was presented that the teacher had used physical force on students and had embarrassed girls in physical education classes. During his twelve years of employment, he was an excessive writer of editorials to the

Edmonton Journal in which he had stated that the community was shallow and substandard, and he had criticized the school system which employed him. It was also learned that after a petition was circulated by the parents of the community who were seeking his removal from staff, the school board requested his resignation. Failing to receive his resignation, the school board terminated his contract of employment. The Board of Reference upheld the teacher in his appeal and ordered his reinstatement with the respondent school board. Reasons for this decision included insufficient evidence to support the grounds on which the school board was basing its decision to terminate the contract of the teacher. There was insufficient evidence to support a charge of assault on students. The punitive actions taken by the teacher were not cruel nor did these measures cause physical damage. The Court was of the opinion that a parent might normally use similar physical action on their own children. The Court also stated that although the school board may have had grounds for dismissal in the previous years when the teacher's letters had appeared in the Journal, it did not then take action. Thus, the teacher's opinions which had then been expressed in writing, could not now be used to contravene the law, namely the teacher's tenure of contract. Also, the Court stated that petitions from parents provide no substantial evidence upon which to base a teacher's termination. The Board held that justifiable reasons for termination did not exist in this case.

On September 2, 1977, the Board of Reference heard a case citing failure to maintain discipline in the classroom (Case #2, Appendix, Boards of Reference cases). In the oral decision of His Honour Judge W.A. Stevenson, the role of the Board of Reference and its reliance upon the evidence presented is summarized by the Judge.

> In determining appeals from a School Board where the decision is attacked on the merits as distinct from technical grounds, the issue for me as a referee is to determine what are the reasons for the dismissal, what are the facts, and whether these facts constitute a proper ground for termination.
>
> Now, I want to make it clear and I think I tried to make it clear during the course of argument, that it is my view that it is the function of the referee to inquire into the facts. And it follows that the evidence before me may be quite different from the evidence that was before the (school) Board who did not, of course, have witnesses in the ordinary sense nor examination nor cross-examination nor evidence under oath. I don't know what material was before the (school) Board. It is idle to speculate on it. (Stevenson, 1977:1,2)

The reasons for termination of contract centered around several separate incidents denoting lack of discipline in the classroom. To this charge, Judge Stevenson made the following reference:

> The primary reason--or I am going to say the only reason for the teacher's dismissal--termination put before me was as set out in the notice of May 13th, particularized to some extent by Exhibit 6, and came down to failure to maintain discipline in the classroom. I think it should be made clear also to everyone here that it is the matters in that notice, those letters, those exhibits which ought to have been considered by the (school) Board. That was the case that this man had to meet. Stevenson, 1977:2)

Judge Stevenson is reinforcing that the actual reasons stated in the Notice of Termination are the only reasons allowed to be presented. Thus the several separate incidents which denoted lack of discipline to the school board, may not in fact be admissible to substantiate the actual reasons stated in the Notice of Termination. Judge Stevenson went on to comment on the evidence before him:

> I have looked for the cause of causes, the possible cause of causes and on the evidence before me (and I stress that it's on the evidence before me not the evidence before the Superintendent or the (school) Board who may have had different evidence, who may draw different inferences, who may put different weight on different events) but on the evidence before me, I cannot find that the discipline problems were attributable to the incompetence or--to incompetence, taking that term in its broadest sense whether it be lack of ability or refusal to carry out instructions or failure to carry out instructions. Whatever aspect of incompetence you want to talk about, I can't find it here and I am not talking in terms of onus at all. I have listened to all the evidence and I have noted it is just not here.
>
> I know there is something wrong. There are a number of resonable explanations given to me. There are some others I could speculate on but I cannot find the incompetence as being the cause. And it follows then that on the material before me that the Appellant ought not to have had his contract of employment terminated. (Stevenson, 1977:6,7)

The reasons for termination cited only a failure to maintain discipline in the classroom. The respondent argued that the teacher's lack of discipline led to incompetence, and incompetence was justified reason for termination. However, the evidence was based solely around several incidents depicting failure to maintain discipline in the classroom, and did not substantiate justifiable reason for termination due to

teacher incompetence. On the evidence presented, it was not found that the discipline problems were attributable to the alleged incompetence. Judge Stevenson upheld the teacher's appeal and ordered his reinstatement.

One case ruling on termination of contract based on alleged unreasonable physical punishment was decided on March 31, 1971 (Case #25, Appendix, Boards of Reference cases). The respondent school board had given four reasons for its termination of the appellant's contract. The first reason stated the application of unreasonable physical punishment as a means of disciplining a grade eight student on February 11, 1971. The three-person Board of Reference found themselves of the unanimous opinion that, on this ground alone, the school board was justified in terminating the appellant's contract and acted reasonably in so doing. The Board took into account all the circumstantial evidence relating to this reason. This case is not, however, indicative that "unreasonable physical punishment" will always necessarily result in successful termination. The Board of Reference has not altogether abandoned the idea that a teacher acting in loco parentis may physically discipline a child.

Designations

Technicalities of Allowable Date. On July 25, 1972, the Board of Reference upheld a termination of designation case which dealt with the technicality of date (Case #16,

Appendix, Boards of Reference cases). The principal's designation had been terminated on 30 days' notice in accordance with section 83 of the School Act. Counsel for the appellant alleged that section 81(b) was not complied with as the Notice of Termination was dated July 25, 1972. That is, there was no allowable date for termination in either the thirty days preceding, or during a vacation of fourteen or more day's duration. The Board of Reference held that section 81(b) applied only to termination of contract and that a termination of designation may be given at any time, and was not limited by section 81.

Term Appointments. On July 9, 1973, a three-person Board of Reference chaired by retired Chief Judge Buchanan heard an appeal on behalf of two teachers whose designations as consultants in elementary music had not been redesignated to them for the 1973-1974 school year (Case #9, Appendix, Boards of Reference cases). The Board of Reference ordered that this case be dismissed because there was no termination of the appellants' designations as consultants in the sense in which the word "termination" is used in the School Act. Since there was no notice of "termination" given by the respondent, there was no appeal under section 85 of the School Act. The three-member committee explained their reason for dismissal of the appeal:

> There was no termination by the Respondent of the Appellants' designations as consultants within the meaning of the word "termination" as used in section 78; the designations were not "terminated" by the Respondent but lapsed

> by the passage of time in accordance with the terms of a contract entered into between the Appellants and the Respondent. At the end of the term 1972-1973 school year, neither of the Appellants had a designation capable of "termination" by the Respondent. Their designations by contract had expired. They had lapsed without any action whatsoever being required on the part of the Respondent. (Buchanan, 1973:7)

There are no restrictions placed by the School Act on the power of designation granting. Nor are there limits set to the terms for which designations of teachers or non-teachers to administrative, supervisory or consultative positions may be made. This decision appears to reflect an attitude on the part of the Board of Reference that school boards do not need to give notice that a term appointment will not be renewed. It also appears to indicate that there is no legal reason to prevent a school board from attaching a term appointment to a designated position.

Notice of Termination and "Reasonableness". One case depicting poor colleague relationship was decided on September 6, 1977 (Case #24, Appendix, Boards of Reference cases). This was an appeal from termination of designation. The appellant, a principal, had experience several problems with staff, the vice-principal, and central office administrators, which alienated the work relationship. His actions amounted to a refusal to cooperate with central office administrators who had attempted to help in resolving the negative work relationships. He had also deliberately failed to comply with instructions from the Superintendent, seeking of the appellant to cooperate in resolving the issues. Presiding Judge

McFadyen, after weighing the circumstances in this case, upheld the termination of designation. She stated that since the entire operation of the school system was based on a team approach and cooperation, this reason, as well as three other stated reasons, was adequate cause for termination (McFadyen, 1977:7).

On June 25, 1980, the Board of Reference heard an appeal from the termination of the appellant's designation as vice-principal (Case #8, Appendix, Boards of Reference cases). The problem lay in the designee's inability to work cooperatively with the principal. Presiding Judge Mr. Justice Stevenson stated that:

> . . . he (vice-principal) is obliged to co-operate in the implementation of policy which is within the principal's jurisdiction. (Stevenson, 1980:11)

The school board had terminated the appellant's designation in December of 1979. To this Mr. Justice Stevenson commented:

> It seems to me that the general rule (absent misconduct) should be termination at the end of the school year. Termination earlier means that the appellant could not find another position in the interim. This result might have been achieved by offering him a terminal appointment, terminating July 1st, with it open to him in the interim to seek a transfer or resign the designation, with the ultimate prospect of seeking comparable employment elsewhere. It ought to have been made clear by handling the matter in that way that there was no reflection on his teaching abilities. (Stevenson, 1980:2)

The Board of Reference ordered that the appellant's designation as vice-principal was to stand until terminated on

July 1, 1980, unless the appellant had by that time chosen to transfer or resign from designation. He was also entitled to be compensated for the administrative designation from the date of school board imposed termination, until July 1, 1980. The Board of Reference, in handing down this decision, was recommending that both parties to this dispute should attempt to reach a mutually acceptable settlement by July 1, 1980, regarding the appellant's employment status with the respondent board for the next school year.

In regard to the technicality of "reasonableness," a Board of Reference decision on March 1, 1971, ordered that it was not reasonable for a school board to terminate a contract of employment when terminating a designation (Case #14, Appendix, Boards of Reference cases). The reasons given for termination fell within the field of administration, the responsibility not of the appellant as a teacher, but of the appellant as a principal. In terminating the contract of employment as a teacher by reason of an error committed not as a teacher but as a principal in the field of administration, the respondent school board did not act reasonably as required by section 78(2) of the School Act.

Remedies Against Board of Reference Orders

Statutory Appeal and Statutory Review to Another Board or Courts

The School Act does not provide for an appeal from Boards of Reference decisions to either another board or to the Courts. Therefore, this remedy is not available.

Although some statutes such as section 28 of the Federal Court Act do expressly provide for judicial review of tribunal decisions on the merits of the case, the School Act does not confer statutory review on the merits from Board of Reference decisions. Therefore, this avenue of redress is not available.

Judicial Review by Way of Prerogative Writs

All legal systems lean very heavily against empowering tribunals to determine conclusively the legal limits of their own powers (de Smith, 1959:8). All legal systems also lean against empowering the tribunal bodies which make decisions in matters directly affecting the interests of individuals, to determine conclusively questions of law (de Smith, 1959:7). A review of the Board's of Reference exercise of its powers is within the jurisdiction of the superior courts because judicial review on the technical grounds of jurisdiction and non-jurisdictional defects has not been excluded, directly or indirectly, by the School Act. Not only does the Board of Reference affect the interests of individuals coming before it, but it also functions in a quasi-judicial manner. Judicial review of Boards of

Reference decisions by way of prerogative writs is available.

"Vehicles" are the remedies which one may seek from the superior courts in order to correct a wrongful decision of an inferior tribunal. Vehicles for judicial review are of two types --public remedies and private remedies. The citizen can often have administrative action controlled by the ordinary courts through the use of the public remedies: certiorari, prohibition, mandamus, quo warranto, and habeas corpus. Although the private law remedies of declaration, injunction and damages are traditionally the weapons of ordinary citizens in their battles with each other, these have been made available to the citizen in his fight with administrative authorities. Public and private remedies cannot be sought together in the same action, except for mandamus in Alberta.

Certiorari quashes an illegal decision of a lower court. The end result is that the act or decision is no longer an act or decision to which one need pay any attention. Certiorari is the only public law remedy able to do precisely that. In Alberta, one applies by way of notice of motion for an order in the nature of certiorari. Certiorari is available on both grounds--jurisdicational defect and error of law on the face of the record. Certiorari offers a wide locus standi. A person aggrieved will obtain it as of right. Lack of direct personal

interest may be a basis for refusal of the remedy. There is a short limitation period of six months (A.R.C. 742) allowed in applying for the remedy. Certiorari will only issue to quash the decision of a body that is acting "judicially" or "quasi-judicially" as opposed to "administratively." This remedy will lie to quash a decision of a body set up under statute.

Mandamus is a prerogative order which is issued to compel the carrying out of a public duty, the performance of which has been wrongfully refused. A person applying for mandamus must be a person entitled in law to require the performance of the duty in question. Mandamus is the appropriate remedy if: (a) a tribunal refuses to perform an act stated by statute; (b) if a tribunal refuses to exercise its power of decision; (c) if a tribunal in making its decision follows incorrect procedure to reach the decision; (d) if the tribunal's decision is wrong in some way, for example, an excess of jurisdiction; and (e) if a tribunal misconstrued the statutory formulation in the usage of "may-if" and "shall-if" construction. Mandamus is a discretionary remedy and may be declined if another legal remedy is equally available.

Injunction has become a general utility remedy for use whenever no other form of review proceeding is clearly indicated. An injunction is a prohibitive order directed

to a party defendant in the action, forbidding the defendant to do some action that is unjust, inequitable, or injurious to the plaintiff.

A declaratory judgement, or declaration, challenges subordinate legislation. It is a statement by a superior court declaring what the law is. It may be used to make a simple declaration of the applicant's legal position, or to supervise a tribunal's exercise of its powers in that it may declare an illegal tribunal decision void. Declaration may be granted where a tribunal acts in excess of its jurisdiction.

Prohibition prevents inferior courts or other public bodies from performing illegal acts. To date, only one appeal from a Board of Reference decision has sought this remedy.

Grounds for Judicial Review

"Grounds" are reasons of error upon which one may seek a review to the superior courts. The two grounds for judicial review are jurisdictional defects and non-jurisdictional defects. The former may be broken down into: (a) jurisdictional fact; (b) ultra vires; and (c) natural justice. A non-jurisdictional defect is also known as error of law on the face of the record.

In regard to jurisdictional defects, jurisdictional facts are facts on which the jurisdiction of the tribunal

depends. If a tribunal may purport to determine a substantive issue for which it has no jurisdiction to do so, the determination will be a jurisdictional defect. An ultra vires act denotes a tribunal going beyong its delegated power. A tribunal decision made without regard to the particular requirements of natural justice in the given circumstance is also a defective determination.

An error of law is to go wrong, but may not involve going beyond the powers prescribed in a statute. If an authority acts within its powers but makes mistakes, the courts cannot interfere if proceedings are regular on their face. However, where there is an "error of law on the face of the record," the courts will intervene even if the decision is intra vires. Further, the error may be of any kind, like a refusal to admit relevant evidence. The "record" includes documents upon which the decision is based as well as the statement of the decision itself, and an oral statement of reasons may be part of the "record." The following are examples constituting error of law: acting on no evidence; and misconstruction of a statute, regulation, etc. Error of law is limited to judicial and quasi-judicial bodies.

Instances of Judicial Review

The writer has two Boards of Reference decisions which were reviewed on the ground of jurisdictional defect and one Memorandum of Judgement commenting on the teachers' statutory right to appeal to the Board of Reference. There is only one Board of Reference case which was reviewed on the ground of non-jurisdictional defect. Cases appealed on the former ground will be explained first.

Grounds of Jurisdictional Defect. Case No. 1: Board of Trustees of the Bonnyville School District No. 2665 v. Roshan Suleman (July 15, 1971) Trial Division of the Supreme Court of Alta.: Honorable Mr. Justice Dechene.

This was an application for an order in the nature of certiorari to quash that portion of a decision of the Board of Reference, ordering the Appellant to pay to the Respondent the sum of $4,000.00 in addition to a sum required to be paid in accordance with its Notice of Termination. The main ground relied upon in support of the Motion was that because the question of adequate notice had not been before the Board of Reference, the award constituted a denial of natural justice.

No reasons were given for the Board's order, nor was any transcript made of the evidence before it. The Respondent's Notice of Appeal to the Board did not contain any complaint regarding the adequacy of the Appellant's Notice of Termination. The inadequacy of the period of notice given by the Applicant to the Respondent was never raised as an issue

either in the notice of appeal, the evidence adduced, or in argument. It was only when the oral judgement was given that this matter was raised, and counsel for the trustees had no opportunity to be heard in answer to the said issue.

Judge Dechene was of the opinion that the decision of the Board of Reference to hold that the Applicant had acted reasonably and that its termination of the Respondent's contract should be sustained, was a contradiction of the further term of the Order that the Respondent should be compensated. If the Board of Reference were subject to the Administrative Procedures Act, Chapter 2, Revised Statutes of Alberta, 1970, the applicant would have been informed of any additional facts in the possession of the Board of Reference, and been given a reasonable opportunity to furnish relevant evidence to contradict or explain them. Section 8 would have required the Board to furnish a written statement of its decision, setting out: (a) the findings of fact upon which it based its decision; and (b) the reasons for the decision. Having nothing before him but the record transmitted by the Board of Reference for the reasons stated above, Judge Dechene was of the opinion that the principle of "audi alteram partem" had been violated. He then made an order quashing that portion of the Board's order requiring the Applicant to pay compensation of $4,000.00 to the Respondent.

Case No. 2: William Glass, Applicant, and the Honorable Mr. Justice Holmes, sitting as a Board of Reference under the Provisions of the School Act R.S.A. 1970, c. 329, Respondent, and the County of Strathcona #20 Board of Education (October 3, 1979) Court of Queen's Bench of Alberta: Mr. Justice Feehan.

On August 27, 1979, Mr. Justice Holmes was asked to decide a preliminary objection to jurisdiction (Case #33, Appendix, Boards of Reference cases). The appellant argued that as his employment was not properly terminated, a question which was raised on affidavit evidence, the Board of Reference had no jurisdiction. Justice Holmes ruled that the question as to whether or not the employment had been properly terminated was a question for the Board of Reference and was not a question going to jurisdiction. The Board as referee had jurisdiction to decide, inter alia, that issue. That is, this was only one among other things for which the Board had jurisdiction.

At this point in the Board of Reference proceedings Mr. Justice Stevenson was asked to decide a preliminary objection to jurisdiction of the referee Mr. Justice Holmes. Stevenson ruled that it was clear to him from the judgement of the Appellate Division to which he was referred that this so-called preliminary point was a matter to be determined on the reference. In other words, the question as to whether or not the employment had been properly terminated was a question for the Board of Reference and was not a

question going to jurisdiction. The referee, Mr. Justice Holmes, had jurisdiction to decide, inter alia, that issue. Stevenson made no decision on the merits of the matter.

This October 3, 1979, judgement dealt with an order of certiorari quashing the decision of the Respondent Board of Reference made on August 27, 1979. To this Mr. Justice Feehan replied that Stevenson had made no decision on the matter but had merely said that the points before him should be decided on reference. Therefore, this was not a decision subject to certiorari. This part of the application was dismissed.

This same application of October 3, 1979, also sought an order prohibiting the Board of Reference from hearing the appeal filed by the applicant on the ground that the dismissal procedure was a nullity. Justice Feehan ruled that the Board of Reference had the right to accept or reject that argument. It was clear to Justice Feehan that Stevenson had left that question to the Board of Reference and that the Board had a right to hear it. Mr. Justice Feehan dismissed the application.

It was not until the middle of May, 1980, that the Board of Reference sat to hear the merits of the appeal. At that time it was rendered that the appellant's overall compliance with the school board's directives for improvement in teaching was unsatisfactory. The respondent had acted reasonably in terminating the contract of employment.

Case No. 3: Lethbridge Catholic School District No. 9, Appellant v. Arthur McCluskey, Respondent (March 8, 1979) Edmonton Civil Sittings, Appeal No. 12441: Trial Judge J. M. Hope.

In this Memorandum of Judgement the Court ruled that as the teacher had a statutory right to appeal to the Board of Reference under the School Act, the Court should decline to review the matter and to leave him to his appeal. The teacher's position was therefore to remain terminated until the order was set aside. Therefore, the Board of Reference was obliged to hear the teacher's appeal on the merits and to make such order as to reinstatement or termination with discretion as to the time at which termination might become effective as the Board saw fit. If the Board refused to act, a mandamus might have been applied for. The Court expressed no opinion regarding the effect of the subsequent hearing and termination of the teacher's employment in a manner satisfactory to the parties. This appeal was allowed and the order of the learned Chambers Judge quashed.

Grounds of Non-Jurisdictional Defect

Case No. 4: Board of Trustees of St. Albert Protestant Separate School District No. 6 v. Kathleen May Elliott (1972).

This was an application for an order in the nature of certiorari, quashing the decision of the Board of Reference, which reinstated Elliott's contract of employment.

The ground upon which the Applicant based this application was: that there was an error in law on the face of the record specifically that the Board of Reference erroneously assumed that the Board of Trustees was a quasi-judicial or a judicial body or was acting as such when considering this matter and that, therefore, it was bound by the rules of natural justice.

Justice Lieberman was of the opinion that section 76 of the School Act imposed upon the Board of Trustees when considering this matter, the obligation of dealing with the rights of an individual, and when dealing with those rights, the Board of Trustees was exercising at the least a quasi-judicial function, and as such must observe the rules of natural justice. It was apparent from the record that these rules were not observed. This was clearly set out in the decision of the Board of Reference, which formed part of the record. In not observing the audi alterma partem rule, the Board of Trustees failed to act reasonably. The application was accordingly dismissed.

Summary

School boards are given statutory power to terminate and/or suspend teaching contracts of employment and/or designations. Allowable grounds for termination and the procedure to be employed in terminations are also stated in the School Act.

Section 85 of the School Act grants the right of appeal to the Board of Reference for both school board and teacher in the above stated termination situations. Either party to the dispute may also seek the private law remedies of declaration, injunction and damages in a civil court case. Whether or not the private law remedies would in fact be granted is not a definite matter. In one Memorandum of Judgement the Court ruled that because the teacher had a statutory right of appeal under the School Act, the Court should decline to review the matter and should leave the teacher to his appeal (Lethbridge Catholic School District No. 9, Appellant v. Arthur McCluskey, Respondent (March 8, 1979) Edmonton Civil Sittings, Appeal No. 12441: Trial Judge J. M. Hope). A Supreme Court of Canada decision also held that if an appellant was entitled to an appeal to a domestic tribunal as of right, for which he had no valid reason not to pursue directly, then the appellant had no right to an appeal to a Court if he had not exhausted his right of appeal to the tribunal (Re Harelkin and University of Regina (1979) 96 D.L.R. 14).

The jurisdiction of the Board of Reference is a statutory jurisdiction which is set out in sections 85 to 88 of the School Act, and it is judicial in nature. The Board incorporates procedures provided by statute and by common law when hearing appeals and in so doing ensures fairness of procedure to both parties to the dispute. The Board of Reference affects the interest of individuals

coming before it, and also functions as a quasi-judicial body. Therefore, judicial review of Boards of Reference decisions is available on technical grounds by way of the prerogative writs.

CHAPTER IV

OPERATIONAL RESULTS OF THE BOARD OF REFERENCE, 1970 - 1981

Introduction

For the years of 1970 to 1981, the writer was able to collect a total of 49 Boards of Reference cases. Either oral or written "Reasons for Decisions" were obtained for all 49 cases. Access to the records of the Board of Reference was limited because these are kept in so many places--the Department of Education, the Provincial Court House, the Alberta School Trustees' Association, the head office of the Alberta Teachers' Association, the head offices of various school boards, districts and counties, and many lawyers' offices. Decisions of the Board are analysed in two time periods: (a) 1970 to 1976; and (b) 1977 to 1981.

Operations: 1970 to 1976

For the years of 1970 to 1976, the writer was able to obtain a full list of all the people who had filed applications for the Board of Reference. A distribution table showing the annual numbers of applications, withdrawals, hearings and decisions indicates the attrition rate of filed applications for the period of 1970 to 1976 (see Table 4.1).

The discrepancy between the number of decisions rendered and the number of teachers affected is a result of one decision having involved five teachers, and another decision having involved two teachers. Out of the 38 decisions, only 30 had either oral or written "Reasons for Decisions of the Board of Reference." The 30 decisions affected 35 teachers. The writer was able to collect 28 of the 30 "Reasons for Decisions." These 28 decisions affected 33 teachers.

An analysis of the 28 collected Boards of Reference cases (based on Table 4.2) follows, in terms of "legal considerations" and "economic considerations" favoring teachers, school boards and case dismissals. Dismissal means that no decision or order was rendered.

Operations: 1977 to 1981

Since 1976, the writer was able to obtain 21 more oral or written "Reasons for Decisions" transcripts, bringing the final total to 49 cases. These 21 cases were decided in the 1977 to 1981 time period. The writer was not able, however, to obtain a list of all the people who filed applications for appeal during the 1977 to 1981 time period. The writer was told by the Registrar's office that due to personnel changes and retirements, the office no longer kept track of such information. Thus, for the period of 1977 to 1981, it is possible to look only at the trends in Boards of Reference decisions which the writer has in her possession. The writer has no way to find out if in fact there were only

21 decisions in the 1977 to 1981 time period.

During this time period, the decisions favoring teachers tended to stress a lack of evidence to back up the school board reasons for terminations, based on specific terms of the individual employment contracts, incompetence and poor colleague relationships. The decisions favoring school boards tended to stress the school boards' abilities to act in good faith when administering various policies which led to teacher terminations, and in proving that teachers failed to comply with lawful orders of the school boards. The one case that was dismissed, Case No. 31 previously discussed, dealt with the jurisdiction of the Board of Reference. Generally, school board successes in Boards of Reference cases have increased since the mid 1970's.

Table 4.1

Annual Distribution of Applications, Withdrawals, Hearings and Decisions: 1970 - 1976

Year	Number of Applications	Number of Withdrawals Before Hearing Scheduled	Number of Hearings	Number of Withdrawals After Hearing Scheduled	Number of Decisions: Dismissed (No decision Needed)	SB (School Board)	T (teacher)
1970	9	1	8	2	2	2	2
1971	24	1	23	10	1	7	5
1972	21	2	19	10	1	5	3
1973	18	0	18	6	3	7	2
1974	9	6	3	2	0	0	1
1975	5	2	3	3	0	0	0
1976	9*	4	4	2	1	1	0
TOTALS '70-'76	95*	16	78	35	8	22	13
TOTALS '61-'69	18	0	18	12	-	2	4
TOTALS '34-'60	215	49	166	0	-	54	112

Notes:

* one case pending outcome of criminal charges.

Data for the years 1970 to 1976 drawn from files of Registrar's Office ATA office and ASTA office. Since 1970 the Board of Reference handled all these appeals: suspension from contract, termination from contract, and termination from designation.

Data for the years 1961 to 1969 drawn from Annual Reports of the Department of Education.

Data for the years 1934 to 1960 drawn from the thesis of Swan, J.F., The Board of Reference in Alberta, 1961, p. 80.

Prior to 1971, the Board of Reference handled only appeals for ordinary dismissal, and the Minister handled appeals for termination from designation and summary dismissal. Thus the 1934-to-1969 data is probably not an accurate enumeration of "all" teacher appeal cases.

Table 4.2

Boards of Reference Decisions: 1970 - 1976

Decisions in Favor	Table "A"		Table "B"		Table "C"	
	Number of Decisions Rendered		Existing "Reasons for Decisions" Rendered		Writer's Data Based on COLLECTED "Reasons for Decisions" Rendered	
	Decisions	Teachers Affected	Decisions	Teachers Affected	Decisions	Teachers Affected
Dismissed	7	8*	4	5	3	4
School Board	18	22*	16	20	15	19
Teacher/ Principal	13	13*	10	10	10	10
TOTAL	38	43	30	35	28	33

* Figures from Table: Annual Distribution of Applications, Withdrawals, Hearings and Decisions, 1970 to 1976.

Table 4.3

Categorical Analysis of Boards of Reference Cases:
1970 - 1976
Data Based on COLLECTED "Reasons for Decisions" Table "C",
Table 4.2

Category	Dismissed	School Board	Teacher	Total Decisions
Evaluation of Professional Staff	-	-	4	4
Reduction in Professional Staff Work Force	-	6	2	8
Suspension and Dismissal	1	5	3	9
Designations	2	4	1	7
Total Decisions	3	15	10	28

Table 4.4

Analysis of 10 Decisions in Favor of Teachers:
1970 - 1976

Category	Legal Considerations
Evaluation of Professional Staff	(1) Technical notice requirement, s.81 (2) Lack of evidence (3) Lack of evidence: parental pressure not valid basis (4)-Did not give teacher notice of the case they heard against teacher -No opportunity in any form to answer allegations other than hearing by Superintendent -No opportunity to be heard by persons making decision of termination
Reduction in Professional Staff Work Force	(1) Notice served prematurely (2) No opportunity to be heard before school board
Suspension & Dismissal	(1) School board did not afford opportunity to be heard (2) School board terminated contract wrongly . . . because misdemeanor came under s.79(1)--suspension (3) insufficient evidence
Designation	(1) Teacher contract wrongly terminated; only principal designation should have been terminated - punishment did not fit misdemeanor

Table 4.5

Analysis of 15 Decisions in Favor of School Boards: 1970 - 1976

Category	Legal Considerations	Economic Considerations
Reduction in Professional Staff Work Force	(1) Notice served gave teacher generous time to obtain other employment (2) School board acted in good faith, all resignations and staff vacancies were considered (3) School board acted in good faith (4) School board acted in good faith	(5) $4,000 severance pay to teacher--30 days notification not enough (6) Not sufficient notice; -1 teacher, 9 mos. severance pay -2 teachers, difference in total wages between two school boards -2 teachers, no severance pay, did not attempt to obtain other employment
Suspension and Dismissal	(1) Evidence to back up allegations: poor teaching performance (2) Evidence to back up allegations: refusal to obey lawful order of s.b. (3) Evidence to back up allegations: poor relationship with colleagues, students, parents. . . .	-2 mos. salary, inadequate notice

Table 4.5 (cont'd)

Category	Legal Considerations	Economic Considerations
Suspension & Dismissal (cont'd)	(4) Evidence to back up allegation: unreasonable physical punishment as a means of disciplining (5) s.355, School Act, 1955 interpretation (early 1970 case)	
Designations	(1) Evidence to back up allegation of incompetence (2) School board acted reasonably in suspending and terminating only designation . . .	-5 mos. principal's allowance
	(3) as in #4, below (4) sufficient evidence and notice of termination may be given at any time, not limited by s.81	

Table 4.6

Analysis of 3 Decisions Dismissed: 1970 - 1976

Category	Legal Considerations	Economic Considerations	Other Considerations
Suspension and Dismissal	(1) Ex parte information about teacher received from ATA ...	-Mutual agreement involving written resignation and four mos. severance pay	
Designations			(1) No appeal to Board of Reference in respect of expiry date of consultant designations Consultantships for limited terms and notice of discontinuance after stated term not necessary (2) Assistant Superintendent case Board of Reference has no jurisdiction

Table 4.6 (cont'd)

Category	Legal Considerations	Economic Considerations	Other Considerations
			(2) (cont'd) Board of Reference decided on preliminary question: was superintendent hired as a teacher Office of Assistant Superintendent treated as a specialized teaching position Thus, School board wrongfully removed designation, because they were obliged to do it in manner of s.78 Some satisfactory arrangement should be negotiated by both parties.

CHAPTER V

SUMMARIES AND CONCLUSIONS

Summaries

The Statement of summaries begins by offering answers to the questions raised in Chapter I. For the convenience of the reader, each of the general problems is restated as an introduction to the relevant answer.

Question 1

What is the statutory history of the Board of Reference, 1905 to 1981?

This question has been answered in some detail in Chapter II. A summary of the answer is now presented. From 1905 to 1920, it was the duty of the Minister to investigate a termination complaint and to either confirm or reverse the school board's order. From 1921 to 1969, the Minister investigated cases of summary dismissals and suspensions, and from 1949 also investigated termination of designation cases. By 1962, the Minister's role was merely one of overseeing that people delegated by him to look into a contract or designation dispute did in fact carry through their duty and exercise their proper powers. In cases of ordinary contract dismissal, the termination could not take effect until

the Minister had received the decision of the Board of Reference.

From 1921 to 1969, the Board of Reference heard appeals in cases of ordinary dismissal. The composition of the Board was not to exceed three members. Board members enjoyed the power of a commissioner. The Board's duty was to make an investigation into a dispute assigned to it and to make a report on the matter which was "just and reasonable." Since 1934, it had the power to award decisions which were binding on both parties to a dispute.

Question 2

What was the role of the school board in contract terminations, 1970 to 1982?

This question has been answered in detail in Chapter III. A summary of the answer is now presented. A school board is given statutory power to terminate and/or suspend teaching contracts of employment and/or designations. It must employ the procedure and grounds for termination stated in the School Act. Statutory appeal from school board decisions to terminate is available to the Board of Reference.

It is evident that the School Act section 78(2) seems to provide the provision for some form of an inquiry prior to dismissal, harbored in the words, ". . . and in each case the board shall act reasonably."

In the Nicholson case, Mr. Laskin stated that one requirement of "fairness" was the opportunity to make representations before one's services were terminated. It is evident that both the Board of Reference and the higher courts endorse the practice of a hearing at the school board level prior to termination. The requirement of the "form" of the hearing seems to favor either oral or written submissions, and either "in public" or "in camera" hearings, whichever best suits the circumstantial merits of each dispute situation.

Question 3

What is the role of the Board of Reference in contract terminations, 1970 to 1980? What LEGAL PRINCIPLES are applicable to this tribunal?

This question has been answered in detail in Chapter III. A summary of the answer is now presented. In 1970, the Board of Reference became the only statutory avenue of appeal. To this day, it hears cases of suspension and/or termination of employment contracts and/or designations. Both the manner of decision making and the power of decision making are carried out judicially. It holds hearings and observes the rules of natural justice to ensure fairness of procedure during the hearing. After investigation and deliberation it determines the issue conclusively, and imposes obligations upon the rights of individuals. Evidence that the Board of Reference qualifies as a quasi-judicial body is found in the School Act and in records pertaining to Boards of Reference hearings. The Board's decisions may be

judicially reviewed by way of the prerogative writs on the grounds of jurisdictional or non-jurisdictional defect.

Question 4

How do the operational results of the Board of Reference, for the time period 1970 to 1981, affect the teaching profession in Alberta?

This question has been answered in Chapters III and IV. A summary of the answer is now presented. An analysis of the total number of appeal applications received by the Registrar, Department of Education, indicates that there is a high rate of attrition in the number of appeals reaching the "decision" stage. Although statistics were available only for 1970 to 1976, the writer believes that this trend is probably also applicable to the 1977-1981 time period. An analysis of the "Reasons for Decisions" reveals that the Board is an excellent protector of teacher tenure legislation in Alberta. The legal precedents lending themselves the most to this guardianship role have been the Board's insistence that school boards adhere to the rules of natural justice and that school boards fulfill all statutory, procedural requirements when terminating a contract of employment or designation.

Conclusions

The conclusions, though dependent on the summaries for Questions 1 and 2 are also directly addressing the fifth general problem of the study, namely, "What is the future of the Board of Reference?", raised in Chapter I. For the convenience of the reader, the sub-problems are restated as an introduction to the relevant answers.

Question 5.1

To what extent does the operational history of the Board of Reference, viewed in conjunction with A.T.A. and A.S.T.A. expectations, justify its continued existence?

Teachers, unlike other professionals, neither choose nor are chosen by their clients. This provides a rationale for treating teachers differently than in the ordinary master-servant relationship. The Board of Reference is a special structure to oversee the tenure relationship between teachers and their clients. To date, the Board has promoted equitability and stability to the process of inquiry in termination cases. The Board's continued existence is justified as a protector of tenure rights. A contract of employment dispute should go through the following stages: (a) the teacher receives notice of possible termination of contract and is invited to a school board hearing inquiring into the grounds for termination; (b) the teacher receives notice of termination to be effective on a specified date; (c) the teacher appeals to the Minister within 14 days of receipt of

the notice, and the appeal is referred to the Board of Reference; and (d) the Board of Reference sets a date for hearing of the appeal. The Board of Reference investigates and judges each case on its own merits.

Some of the opinions expressed by both members of the public and the educational community indicate that the lone Judges sitting as the Board of Reference have excessively judicialized the process of inquiry. The informality usually associated with tribunal proceedings no longer exists. For example, any educational evidence required to assist the judge in reaching a decision is now presented by either or both counsel or by way of expert evidence. The evidence is subject to cross-examination. Furthermore, some educators have expressed the opinion that if the School Act provides for a Board composition of up to nine members, then one judge sitting as the Board is not satisfactory. Supposedly, the Judge would not be well-versed in the tensions that may exist in the educational milieu and could therefore not adequately protect the interests of the teachers. On the other hand, some members of the public have expressed the opinion that the Board of Reference is an outcome of a very powerful lobby group, namely the A.T.A. As such, the Board has supposedly given teachers more clout than the school boards because the Board requires school boards to meet the procedural matters set out in the School Act before the Board will consider the merits of a case. The writer wishes to express that she has found the judicial personnel to be most apt in exercising the powers and duties vested in the

Board of Reference. The Board requires that statutory procedural requirements be met by both the school board and teacher before it will hear the appeal. As such, the Board has extended fairness of procedure to both parties in the disputes. The writer believes that this type of "procedural expectation" by the Board promotes stability to the process of inquiry in termination cases. In her years of research, the writer spoke to many teachers and school board members. She found that due to a lack of knowledge about what constituted "fairness" in termination procedures, neither teachers nor school boards were necessarily beyond "creative" termination processes which served to their own advantage.

Both the Alberta Teachers' Association and the Alberta Trustees' Association agree that all Boards of Reference should provide written reasons for judgements. Indeed, the decisions of the Board should be made more readily available to the educational community. If school boards and teachers would become more aware of the workings of this tribunal, and thereby more educated, surely it would lead to a more efficient relationship between employer and employee. In turn, it would perhaps be possible to work out some of the less serious termination disputes at the school board level.

To further appreciate the guardianship role embodied within the powers and duties of the Board, a general discussion of the term "tenure" (Appendix B) and an explanation of the entrance procedures into the teaching profession

in Alberta (see Appendix C) are available. The discussion in Appendix C points out that one of the most effective means of removing a teacher from the teaching force in Alberta is to have the teacher's Teaching Certificate cancelled.

Question 5.2

Is it necessary to have a statutory body deal with teacher tenure conflicts?

If the Board of Reference would be done away with, the legal remedies remaining at the teachers' disposal would be civil action and employment contract negotiations with the various school districts.

The civil court route would undoubtedly result in a build-up of legal precedents over time. The time period required for such a legal precedental build-up would be long and costly. Perhaps many teachers would either not want to, or not be able to, afford a civil case. This could lead to teachers giving way to unfair dismissals, which in turn would interfere with academic freedom. Dismissal or threat of dismissal could be used to curtail freedom. The right of a teacher to work without fear of retaliation over trivialities is, of course, an important element of academic freedom.

Teachers could, with their respective school districts, negotiate into their collective agreements items pertaining to teacher tenure. The variety and number of such

negotiable items could be unlimited. It is conceivable that there would be as many different "tenure agreements" as there would be school districts in the province. Uniformity of such terms of agreement across the province would probably not be attainable, because each bargaining unit might not desire the same terms. Disagreements over collective agreements could be handled by either the civil court or an Arbitration Board. Such Boards are, however, expensive. Also, inconsistency in dealing with dismissals due to lack of recorded precedents and change of personnel on the Board may result. The negotiations of tenure clauses into collective agreements could be a very powerful tool for teachers, if either the School Act or Labour Act permitted this and if the Board of Reference was dissolved. Such clauses may spell out in great detail all aspects relating to teaching activities and tenure. However, such contract negotiations could result in a strict "work-to-rule" situation that could become uncomfortable for both teachers and school boards. A teacher's professional discretion in relation to his/her work and school related activities in general would probably have to be diminished in favor of strict adherence to the negotiated contract terms. If this were not done, the contract would cease to be a protective tool for the teacher.

It would be difficult to assess any magnitude of change in professional status, if the protection of the School Act would be removed. Such an assessment would vary depending on what definition of "profession" one chose to use. Also, a change in status would definitely depend upon

"public opinion" of the teaching profession. Opinion in itself is very difficult to monitor.

Other Studies

In conclusion, it is recommended that a comparative study be made of the operations of tenure commissions in other provinces of Canada, and in other countries of the Commonwealth. Such a study could have the purpose of raising, in educators, "tribunal consciousness," thus making more individuals aware of the adherence to or lack of adherence to the universal rules of natural justice, and the quest for procedural fairness and good faith.

It is also recommended that a study be made of the "inquiry process" at the school board level prior to contract terminations, in Alberta and other provinces in Canada. Both school boards and teachers would benefit from such a study in that short-comings in the procedure would be identifiable, and hopefully corrected.

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APPENDIX A

BOARDS OF REFERENCE CASES CITED IN THIS STUDY

Case No.

(1) In Re: Berrard Hughes, and (not found in files). July 8, 1971:

(2) In Re: Sigurd Kawerau, and Lac La Biche School Division #51. September 2, 1977: Oral Decision by Judge W.A. Stevenson.

(3) In Re: William P.M. Glass, and the County of Strathcona No. 20. May 21, 1980: Mr. Justice Holmes.

(4) In Re: Michele Podmoroff, and (not found in files). March 2, 1973:

(5) In Re: Russel Olson, and School Committee, County of Minburn No. 27. April 28, 1971: Chief Judge (Ret.) Buchanan.

(6) In Re: Vernon Sloan, and Board of Trustees of Red Deer School District No. 104. April 28, 1971: Chief Judge (Ret.) Buchanan.

(7) In Re: Roderick N. Mcdonald, and Red Deer Catholic Board of Education No. 17. October 30, 1979: Oral Judgement by Mr. Justice Wachowich.

(8) In Re: Jorge Pizzaro Quiroz, and the County of Red Deer No. 23. June 25, 1980: Mr. Justice W.A. Stevenson.

(9) In Re: Jean Anne Woodrow and Trudie Jane Lazaruk, and Edmonton Public School Board. July 9, 1973: Chief Judge N. Buchanan (Ret.), Dr. L.R. Gue, Dr. R. Warren.

(10) In Re: Herman Dorin, and the County of Mountainview No. 17. July 21, 1971: Chief Judge Buchanan (Ret.).

(11) In Re: Rudy Penner, and Edmonton Public School Board. June 15, 1973: Judge R.P. Kerans.

(12) In Re: Therese Levesque, and (not found in files). December 9, 1970.

(13) In Re: Marie-Angele Paoli, and the Board of Trustees of the Stettler School District No. 1476. July 26, 1971: Chief Judge Nelles Buchanan (Ret.), Dr. E.D. Hodgson.

Case No.

(14) In Re: Donald R. Cyr, and Bonnyville School Division No. 46. March 4, 1971: Chief Judge N. Buchanan (Ret.).

(15) In Re: Wayne Glass, and the School Committee County Warner. February 1, 1979: His Honour Judge Holmes.

(16) In Re: Clarence Yeomans, and (not found in file). July 25, 1972.

(17) In Re: Baldew Singh Parmar, and High Prairie School Division No. 48. February 17, 1972: Chief Judge Nelles Buchanan (Ret.).

(18) In Re: Hubert Harris, and Board of Trustees, Edmonton Public School Board. March 26, 1976: Oral Judgement by Judge Kerans.

(19) In Re: Nora LocKerbie, and (not found in file). July 23, 1971.

(20) In Re: Kathleen May Elliott, and the Board of Trustees of St. Albert, Protestant Separate School District No. 6. Febraury 21, 1972: Chief Justice Nelles Buchanan (Ret.), Judge R.P. Kerans, Dr. E.D. Hodgson.

(21) In Re: Jean Zelasek, and the Board of Trustees of the County of Stettler No. 6. July 7, 1972: Chief Judge Nelles Buchanan (Ret.), Judge R.P. Kerans, Dr. R. Warren.

(22) In Re: George William Smith, and (not found in file). June 25, 1973: Oral Judgement by Judge R.P. Kerans.

(23) In Re: Matt A. Schebel, and Lethbridge Catholic Separate School District No. 9. September 26, 1977: Judge McFadyen.

(24) In Re: John Stanley Hnasko, and County of Parkland No. 31. September 6, 1977: Judge McFadyen.

(25) In Re: Roland E. Theroux, and the Official Trustee of Biggin Hill School District No. 5029, Medley. March 3, 1971: Chief Judge Nelles Buchanan (Ret.).

(26) In Re: Keith McCargar, and (not found in files). July 7, 1971.

(27) In Re: Beverly Joan Graham, and the Board of School Trustees of Cold Lake Roman Catholic Separate School Division No. 64. August 8, 1977: Judge Wachowich.

Case No.

(28) In Re: Esther Mathews, and the Board of Trustees of Edmonton Public School Board No. 7. January 12, 1973: Chief Judge Nelles Buchanan (Ret.).

(29) In Re: Kay Davis, Roland MacIntosh Smith, Jaroslav Stephen Gregorash, Norma Lavina Elliot, and Eunice Marie Valleau, and Buffalo Park School District No. 5047. September 18, 1973: Judge Belzil.

(30) In Re: Jack Edward Longford, and the County of Ponoka No. 3. July 8, 1976: Oral Judgement by His Honor Judge R.P. Kerans.

(31) In Re: George William Smith, and the Board of Trustees of the Edmonton School District No. 7. September 5, 1979: Judge E. McFadyen.

(32) In Re: The Board of Trustees of the Rocky Mountain School Division No. 15, and Glen Wade Gray. December 8, 1980: Justice J.D. Bracco.

(33) In Re: William P.M. Glass, and the County of Strathcona No. 20 Board of Education. May 21, 1980: Mr. Justice Holmes.

(34) In Re: Case No. 33 above. (Preliminary Objection, Memorandum of Reasons Delivered from the Bench by Judge Stevenson, August 27, 1979.)

APPENDIX B

BRITISH NORTH AMERICA ACT

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: -

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

*(4) In case any such Provincial Law as from Time to Time seems to the Governmor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section. ****

**** Section 93 was altered for Alberta by section 17 of The Alberta Act, 4-5 Edw. VII, c. 3 which reads as follows:*

Education *17. Section 93 of the British North America Act 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph: -*

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

APPENDIX C

DISCUSSION: "TENURE"

Tenure

As defined in a previous thesis study on The Board of Reference in Alberta (Swan, 1961, University of Alberta), "tenure" encompasses a set of rights, conveyed and protected by law, whereby a teacher cannot be dismissed from his position except under procedures laid down by statute (Swan, 1961). "Tenure teacher" indicates a teacher who lawfully enjoys such rights, and who therefore possesses "tenure status" (Swan, 1961). Several authorities consulted all agreed that some form of legislation should guarantee tenure status to teachers who have successfully completed a period of probationary service. They also held that legislation should protect tenure teachers against arbitrary dismissal by setting forth several conditions which should be met in order that teachers' contracts may be lawfully terminated (Ellsbree and Reutter, 1954; Chandler and Petty, 1955; Moore and Walters, 1955; Weber, 1954). The Board of Reference during the time period of 1970 to 1980 did in fact serve as an active statutory example for protection of the tenure teacher.

While purists may debate the question whether salaried employees, working for a single employer, ever can be sufficiently independent to be true professionals, the complexity of modern-day economic and social organizations has in fact brought about employee status for a great many

people who perform professional roles and expect professional status. Teachers, university professors and clergymen, unlike doctors and lawyers, have among the traditional learned professions usually occupied salaried roles within an employer-employee relationship. In schools and universities the tension between freedom and security has been more acute than in other professional worlds in reflecting the conflict between the scholar's social role of critical independence and his personal interest in continuance of his salary from the institution which employs him.

In many countries, and in every province and territory in Canada, special statutes govern the teaching profession. Typically the statutes provide that the teacher who has successfully completed a probationary period obtains tenure and may not be terminated except for cause, and then only after a hearing of some kind. Teacher tenure systems are legitimate attempts to bring order and stability to a significant sector of public employment. Teacher tenure provides a measure of job security and to some extent fosters freedom of expression in the classroom. Since students' attendance in schools is compulsory, and this compulsion is justified by the theory that it is for their benefit, it is especially important that the administrative scheme of the schools be shaped to serve their clients. While tenure statutes allow for removal of incompetent teachers, they also seem to provide a reasonable balance between the interests of the community and the needs of teachers.

Academic freedom in its teaching aspect is fundamental for the protection of the rights and liberties of the teacher in teaching and of the student in learning (Joughlin, 1967). Academic freedom enables members of the academic community to research, investigate and teach without having unnecessary restrictions of officious supervision placed on their activities. The value of this freedom has long been recognized by American Courts in the realization that if teachers do not have this freedom, the effectiveness of the schools in which they teach is appreciably diminished (Leder, 1975). Academic freedom therefore requires the protection of teachers from outside influences and pressures that could compromise their ability to study and transmit knowledge to students. Because members of the academic community are dependent upon teaching as a means of livelihood, a threat to their job security is one method by which academic freedom can be curtailed. The right of the teacher to work without fear or retaliation over trivialities is an important element in academic freedom.

It would appear that tenure is not merely an incident of fresh contract but something approximating "status" --a characteristic recognized by law as attaching to one's person as faculty member, of which he may not be arbitrarily divested (McConnel, 1973). A person has a protectible interest, similar to a property right in his employment, if he has more than an abstract need or desire for continued employment. He must have more than a unilateral expectation

of it. This legitimate claim to entitlement may arise through the creation of such an interest by a statute or by creation of a contractual obligation (Leder, 1975).

In Alberta, the School Act does to a certain extent protect teacher employment by virtue of the availability of the Board of Reference in the three kinds of disputes heretofore mentioned. Also, section 76 of the Act states that unless there is agreement to the contrary a contract of employment between the board and a teacher continues in force from year to year. In the examination of Board of Reference cases, it is evident that a teacher's contract of employment is in fact treated similarly to a property right in that the teacher may not be arbitrarily divested of it without due cause and due process, or due compensation and due process.

There is no mention in the School Act of tenure per se, or of any probationary period. It is worth noting that before the 1970 revision of the School Act, teachers did have a probationary year. Since the 1970 School Act dispensed with probation, many school boards in Alberta have made significant use of the temporary or one-year contract provision for teachers which remains in the statutes in section 76.2. Thus, the school board is able to review the work of the teacher during the temporary contract period. The net effect is the same as if there still existed statutory provisions for a probationary year. If at the end of this temporary contract period the teacher is evaluated as being

a teacher worthy of a continuous contract, he is then recommended for the same, and thus becomes a "tenured teacher," entitled to the protection of employment offered in the School Act.

APPENDIX D

DISCUSSION: ENTRANCE, ETHICS, AND EMPLOYMENT GOVERNANCE IN THE TEACHING PROFESSION IN ALBERTA

Entrance, Ethics, and Employment Governance

In Alberta, school boards can employ as teachers only persons holding properly issued certificates of qualification, as set out under the Department of Education Act, 1970. The Alberta Minister of Education has the authority to certify teachers, and to cancel or suspend the certification of teachers. The certification, cancellation, or suspension is carried through on the recommendation of various school board personnel entrusted with the job of teacher evaluation. These personnel usually include the administrators within a school who communicate, through written word, the request for certification or suspension or cancellation of certification, to the Minister.

The three types of certificates are: Interim Professional, Provisional, and Permanent Professional. An Interim Professional Certificate may be issued to persons having a Bachelor of Education degree, or a degree other than a B.Ed. and one completed year of approved work in the Faculty of Education. A Provisional Certificate may be issued to people who are admitted to the second year of the B.Ed. program on the basis of being either: (a) the holder of a journeyman's certificate or its equivalent; or (b) the holder of an approved certificate or diploma from an acceptable school of fine arts; and both categories (a) and (b) must successfully complete the third year of the B. Ed.

program. An Interim or Provisional Certificate may be issued only to a Canadian citizen or a landed immigrant. A Permanent Professional Certificate may be issued to persons having successfully completed two years of teaching or related professional experience, provided that the person has first qualified for an Interim Professional Certificate. A Permanent Certificate may be issued only to Canadian citizen or a British subject who holds a certificate issued under the predecessors of the regulations as stated in the Department of Education Act, 1970. A certificate issued to any person who is not a Canadian citizen shall be cancelled seven years after the date of issue of the certificate, unless the certificate holder proves to the satisfaction of the Registrar that he has become a Canadian citizen. A more detailed appreciation of the above may be gained from a reading of Appendix B.

The government has granted teachers the privilege of a form of self-government. The Teaching Profession Act (see Appendix C) established and constitutes a body corporate and politic. The Association can take any measure it deems necessary in order to give effect to any policy adopted by it with respect to any question or matter directly or indirectly affecting the teaching profession. The objects of the Association are: (a) to provide the cause of education in the province; (b) to improve the teaching profession; (c) to arouse and increase public interest in the importance of education; and (d) to cooperate with other organizations and bodies in Canada and elsewhere having the same or like aims

and objects. School boards may employ only teachers who are active members of the ATA. An active member is a certified teacher who pays the yearly dues which entitles him/her to membership in Alberta Teachers' Association.

The Alberta Teachers' Association disciplines teachers who breach or violate the ATA Code of Ethics or the ATA Standards of Professional Conduct (see Appendices D and E, respectively). The Teaching Profession Act grants the ATA permission to establish a Discipline Committee pursuant to the Discipline Bylaws of the ATA (see Appendix F). The Discipline Committee hears and decides on cases of ethical or professional violations as stated in Appendices C, D and E. A person who is found guilty by this Committee may appeal to the Teaching Profession Appeal Board, which is also established under the Teaching Profession Act. The decision of this Teaching Profession Appeal Board is determined by the majority of its members and it is final and binding on all parties. Disobedience of these decisions may result in monetary fines and/or expulsion from active membership in the Alberta Teachers' Association. If a teacher is expelled from active membership he may not be employed by any school board.

In summary, entrance into the teaching profession is regulated because school boards may employ as teachers only persons who are both active members of the ATA (see Appendix C, The Teaching Profession Act) and who hold properly issued certificates of qualification. The various grievance

mechanisms set up within the teaching profession deal basically with internal professional matters, such as teacher versus teacher complaints. The Board of Reference, established by the School Act (see Appendix G) sections 84 to 88, handles teacher-school board disputes arising out of suspension from contract, termination from contract, and termination from designation. Other employment matters such as "conditions for employment" and "working conditions" and "employment benefits" are governed by statutory provisions, such as those found in the School Act and the Labour Act.

APPENDIX E

REGULATIONS GOVERNING CERTIFICATION OF TEACHER UNDER THE DEPARTMENT OF EDUCATION ACT

Regulations Governing Certification of Teachers under the Department of Education Act

The regulations stated below were issued on June 23, 1975. Minor changes in wording and numbering have been proposed for the next publication of this document.

1. In these Regulations:

(a) "acceptable" or "approved" means, respectively, acceptable to the Minister or approved by the Minister;

(b) "Acceptable officer" means

(i) a Superintendent of Schools appointed pursuant to section 65, subsection (1), clause (a) of The School Act, or

(ii) an inspector of schools employed by the Department of Education, or

(iii) an educational consultant employed by the Department of Education, or

(iv) any other person authorized in writing by the Minister;

(c) "Bachelor of Education degree" means a degree granted on completion of a four year program in a Faculty of Education of a university in Alberta;

(d) "certificate" means a teaching certificate issued pursuant to these regulations or the predecessors of these regulations;

(e) "journeyman's certificate" includes a certificate of proficiency issued pursuant to The Tradesmen's Qualification Act or a certificate of qualification issued pursuant to The Apprenticeship Act;

(f) "landed immigrant" means a person lawfully admitted to Canada for permanent residence;

(g) "Minister" means the Minister of Education.

INTERIM PROFESSIONAL CERTIFICATES

Interim Professional Certificates

2. A person may be issued an Interim Professional Certificate where that person

(a) was admitted to a Faculty of Education of a university in Alberta for the 1968-69 academic year or any academic year thereafter and obtains a Bachelor of Education degree, or

(b) holds an acceptable degree (other than a degree in education) from a university in Alberta or from any other approved institution and completes one year of approved work in a Faculty of Education of a university in Alberta or at any other approved institution, or

(c) holds an acceptable degree in education from an institution outside of Alberta and completes any additional period of approved work that may be prescribed by the Minister in a Faculty of Education of a university in Alberta or equivalent work at any other approved institution.

3. Subject to section 11, clause (a), an Interim Professional Certificate expires on August 31 of the third year following the year in which it was issued.

Provisional Certificates

4. (1) A person may be issued a Provisional Certificate upon application therefor made prior to September 30, 1981, where that person

(a) was admitted to the second year of a Bachelor of Education degree program in a Faculty of Education of a university in Alberta for the 1973-74, 1974-75, 1975-76, 1976-77, 1977-78, 1978-79, or 1979-80 academic year or to a program at an approved institution outside of Alberta on the basis of being

(i) the holder of a journeyman's certificate or its equivalent,

(ii) the holder of an approved certificate or diploma from an acceptable school of fine arts, and

(b) successfully completes the third year of the Bachelor of Education degree program or acceptable equivalent work at the approved institution as the case may be.

5. A person may be issued a Provisional Certificate upon application therefor made prior to September 30, 1975, where that person

(a) has completed the third year of a Bachelor of Education degree program or acceptable equivalent work at a university in Alberta, or

(b) has completed equivalent work at an approved institution outside of Alberta.

6. Subject to section 11, clause (a), a Provisional Certificate expires on August 31 of the third year following the date of its issue.

7. (1) Where the holder of a Provisional Certificate does not qualify for an Interim Professional Certificate and prior to the date of expiry of the Provisional Certificate

(a) furnishes to the Minister acceptable evidence of the completion of further academic work towards qualifying for an interim Professional Certificate, and

(b) obtains a recommendation for an extension from an acceptable officer on the basis of satisfactory teaching experience, the Minister may extend the term of the Provisional Certificate for one year.

(2) The Minister shall not grant more than three extensions under this section in respect of any Provisional Certificate.

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Permanent Certificates

8. Subject to subsection (2), where a person

(a) holds an interim certificate of any class issued under these regulations or any predecessors of these regulations,

(b) has completed, while holding that certificate, two years of teaching or related professional experience in any one of the following:

(i) a school in Alberta or the Northwest Territories that uses a course of study or pupil program prescribed or approved by the Minister of Education, or

(ii) a vocational, technical or agricultural school or institute or agricultural and vocational college operated by the Minister of Advanced Education and Manpower, or

(iii) a public college under The Colleges Act or a private college as defined in The Colleges Act,

and

(c) obtains the recommendation of an acceptable officer, that person may be issued a permanent certificate of the same class.

(2) On or after September 1, 1976, a person holding an interim certificate of any class issued pursuant to the regulations in effect prior to September 1, 1968 shall not be issued a permanent certificate other than a Permanent Professional Certificate and then only where that person has first qualified for an Interim Professional Certificate under Section 2.

Certificate Issued Under Former Regulations

9. (1) A person who holds an interim certificate of any class issued under the regulations in effect prior to September 1, 1968 may

(a) be issued an Interim Standard Certificate on completion of the second year of a Bachelor of Education degree if the application therefor is made prior to August 31, 1976;

(b) be issued an Interim Professional Certificate on completion of the third year of a Bachelor of Education degree program if the application therefore is made prior to August 31, 1976.

(2) A person who holds a permanent certificate of any class issued under the regulations in effect prior to September 1, 1968, may

(a) be issued a Permanent Standard Certificate on completion of the second year of a Bachelor of Education degree program if the application therefore is made prior to August 31, 1976;

(b) be issued a Permanent Professional Certificate on completion of the third year of a Bachelor of Education degree program if the application therefor is made prior to August 31, 1976.

(3) Subject to section 8, subsection (2), a person who holds a certificate issued under the regulations in effect prior to September 1, 1968 belonging to a class of certificate shown in the first column of the schedule to these regulations, may be issued a certificate of the class shown opposite in the second column in that schedule.

Restrictions

10. (1) A permanent certificate of any class may be issued only to

(a) a Canadian citizen, or

(b) a British subject who holds a certificate issued under the predecessors of these regulations.

(2) an interim certificate of any class or a Provisional Certificate may be issued only to a Canadian citizen or a landed immigrant.

(3) A certificate issued to any person who is not a Canadian citizen shall be cancelled seven years after the date of issue of the certificate unless prior to the cancellation date the holder of the certificate proves to the satisfaction of the Registrar that he has become a Canadian citizen.

(4) Subsection (3) does not apply to a person who holds a certificate (of any class) issued under the predecessors of these regulations.

Powers of the Minister

11. The Minister may

(a) extend or reissue any person's certificate on such terms and conditions as he considers necessary and proper;

(b) issue letters of authority (which shall be deemed to be certificates under these regulations) to persons with acceptable academic and professional or technical qualifications not otherwise qualified for certificates under these regulations, on such terms and conditions as the Minister considers necessary and proper;

(c) extend the range of grades which may be taught by a person who holds one of the certificates listed in the schedule to these regulations;

(d) extend any time period prescribed by these regulations for the completion of any work or the making of any application.

12. The Minister may cancel or suspend any certificate for cause.

13. (1) Certificates shall be signed by the Minister or the Deputy Minister of Education and by the Registrar for the Department of Education.

(2) The signatures of the Minister, the Deputy Minister of Education or the Registrar for the Department of Education may be mechanically reproduced on a certificate.

14. The Regulations respecting Certification of Teachers, filed as Alberta Regulation 265/70, are hereby rescinded.

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APPENDIX F

THE TEACHING PROFESSION ACT

The Teaching Profession Act

(CHAPTER 362 R.S.A. 1970)

1. This Act may be cited as *"The Teaching Profession Act"*.

INTERPRETATION

2. In this Act,

(a) "association" means The Alberta Teachers' Association;

(b) "bylaws" means the bylaws of the association;

(c) "Department" means the Department of Education;

(d) "executive council" means the Provincial Executive Council of the association;

(e) "executive secretary" means the chief executive officer of the association;

(f) "member" means a member in good standing of the association;

(g) "Minister" means the Minister of Education;

(h) "school board" means the board of trustees of a school or a school division, the council of a city or town operating under *The Municipal and School Administration Act;*

(i) "superintendent" means a superintendent appointed by a school board pursuant to *The School Act* and the teacher, if any, who is appointed by the school board to be his chief deputy;

(j) "teacher" means a person holding a permanent or temporary certificate of qualification as a teacher issued by the Minister under *The Department of Education Act.*

THE ALBERTA TEACHERS' ASSOCIATION

3. (1) There is hereby established and constituted under the name "The Alberta Teachers' Association" a body corporate and politic.

(2) The association may take any measure that is not inconsistent with the provisions of this Act, or of any Act or regulation of the Province, and that it deems necessary in order to give effect to any policy adopted by it with respect to any question or matter directly or indirectly affecting the teaching profession.

(3) The association may acquire by gift, purchase or otherwise, and may sell, mortgage, lease or otherwise dispose of real and personal property, for the purpose of carrying into effect and of promoting the objects and designs of the association.

OBJECTS

4. The objects of the association shall be

(a) to advance and promote the cause of education in the Province,

(b) to improve the teaching profession

(i) by promoting and supporting recruitment and selection practices which ensure capable candidates for teacher education,

(ii) by promoting and supporting adequate programs of preservice preparation, internship and certification,

(iii) by promoting the establishment of working conditions that will make possible the best level of professional service,

(iv) by organizing and supporting groups which tend to improve the knowledge and skill of teachers,

(v) by meetings, publications, research and other activities designed to maintain and improve the competence of teachers, and

(vi) by advising, assisting, protecting and disciplining members in the discharge of their professional duties and relationships,

(c) to arouse and increase public interest in the importance of education and public knowledge of the aims of education, financial support for education, and other education matters, and

(d) to cooperate with other organizations and bodies in Canada and elsewhere having the same or like aims and objects.

MEMBERSHIP

5. (1) Subject to this section the employment of a teacher by a school board, other than as a superintendent, is conditional upon the teacher being and continuing to be an active member of the association.

(2) When a school board employs a teacher, other than as a superintendent, the board shall notify the association in writing of the name of the teacher, the date of commencement of employment and the amount of salary to be paid, and notwithstanding subsection (1), the employment of the teacher by the school board is valid until the association notifies the school

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board in writing that the teacher is not an active member.

(3) When a teacher who is employed by a school board, other than as a superintendent, ceases to be an active member, the board may continue to employ the teacher until the association notifies the board in writing that the teacher is not an active member.

6. (1) The membership of the association is composed of active, associate, life, honorary and student members.

(2) Only teachers who are employed by school boards, other than as superintendents, may be active members of the association.

(3) The association may grant associate, honorary, life or student membership to any person who meets the conditions prescribed by the by-laws.

7. (1) Active members have the right to vote and, subject to the by-laws, have the right to hold office in the association.

(2) Associate members have the right to vote and, subject to the by-laws, have the right to hold office in the association, but are not subject to the provisions of the by-laws relating to discipline and approved by the Lieutenant Governor in Council pursuant to section 15, subsection (1).

(3) Life, honorary and student members do not have the right to vote or to hold office in the association and are not subject to the disciplinary provisions contained in this Act or the bylaws.

BYLAWS

8. The association in general meeting may pass bylaws not inconsistent with the provisions of this Act or any Act or regulation of the Province concerning

(a) the election of the executive council and officers of the association,

(b) the formation, government, management and dissolution of local associations,

(c) the management of its property and affairs and its own internal organization and administration,

(d) the maintenance of the association and the fixing and collecting of annual and other fees,

(e) the time, place and conduct of the annual and other meetings of the association,

(f) standards of professional conduct, a code of ethics and the establishment of a discipline committee and the discipline of members for breaches of such standards, and

(g) all such other matters as are deemed necessary or convenient for the management of the association and the promotion of its welfare or the conduct of its business.

GOVERNMENT OF ASSOCIATION

9. The association shall be governed by an annual general meeting, which shall be held during Easter week of each year or at such other time as the executive council deems expedient.

10. The annual general meeting shall be composed of the officers, the executive council and, as provided by the bylaws, the delegates from local associations.

11. (1) The business of the association shall be transacted and carried on by the executive council.

(2) The executive council shall be composed of the officers of the association and at least seven other persons who shall be elected by districts.

12. Every active, associate and student member shall pay such fees as may be fixed by bylaw.

13. Every school board shall deduct the membership fee to the association from the salary of every teacher it employs other than as a superintendent and shall pay the membership fees and furnish a list of teachers in its employ each month to the association.

14. Nothing in this Act shall be deemed to interfere with the rights of separate schools as provided in *The School Act*.

DISCIPLINE

15. (1) No bylaws relating to discipline and no amendments or repeals thereof are valid or take effect until approved by the Lieutenant Governor in Council.

(2) Where any witness has been served with a notice to attend and give evidence before the discipline committee constituted pursuant to the bylaws of the association relating to discipline, if the witness

(a) fails to attend in obedience to the notice,

(b) fails to produce any books, papers or other documents in obedience to the notice,

(c) fails in any way to comply with the notice, or

(d) refuses to be sworn or to answer any question allowed by the committee,

he is liable to attachment upon application by notice of motion to a judge of the Supreme Court and may be punished as for contempt of court and, where the witness is the member whose conduct is being investigated, the failure or refusal shall be deemed unprofessional conduct within the meaning of the bylaws of the association relating to discipline.

16. (1) An investigation may be made with respect to the professional or ethical conduct of any active member but no disciplinary action shall be taken against a member unless a hearing has been held by the discipline committee.

(2) Where it appears that a former member has been guilty of unprofessional or unethical conduct while he was an active member, disciplinary proceedings may be instituted against him at any time within 6 months from the date he ceased to be an active member, in the same manner as if he were still an active member.

17. (1) An accused person shall be given at least ten days' notice in writing of the matter to be heard and of the time and place of the hearing by the discipline committee.

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(2) A person is deemed to have been given notice under this Act if it is delivered to him personally or if it is posted in a prepaid registered envelope addressed to his place of residence as shown in the records of the association.

(3) The discipline committee may hold the hearing in the absence of the accused person if notice of the hearing has been given in the manner and in the time prescribed by this section.

18. (1) In every hearing the discipline committee shall

(a) allow the accused person to be represented by counsel,

(b) hear all evidence in support and in defence of the complaint,

(c) decide the guilt or innocence of the person, and

(d) notify the accused person and the executive council of its decision and the penalty, if any, it recommends as being suitable.

(2) All evidence given by witnesses at a hearing shall be given under oath which shall be administered by the person presiding at the hearing.

(3) An accused person who has been found guilty by the discipline committee may, within seven days of notification referred to in subsection (1), clause (d), by written notice to the executive secretary, request a hearing before the executive council to make representations on the question of the penalty to be imposed.

(4) Upon receipt of a request pursuant to subsection (3), the executive secretary shall

(a) make arrangements for the hearing requested, and

(b) give the accused person not less than 14 days' notice in writing of the date, place and time of the hearing.

19. (1) The executive council shall consider the decision of the discipline committee and the recommendation and representation (if any) made by or on behalf of the accused person on the question of the penalty and may thereupon

(a) expel the accused person from the association, or

(b) suspend the accused person from the association for any period of time it considers proper, or

(c) recommend to the Minister that he suspend or cancel the teaching certificate of the accused person, or

(d) require the accused person to pay a fine, or

(e) require the accused person to pay a sum of money calculated by the council as the costs of the hearing, or

(f) discipline the accused person in any other way it considers proper.

(2) The fine required to be paid and the costs under subsection (1) are recoverable as a debt owing to the association.

(3) The executive council shall notify the accused person of the penalty it imposes.

20. (1) There shall be a board to be known as the Teaching Profession Appeal Board which shall be composed of three members, one of whom shall be appointed by the executive council and the other two by the Lieutenant Governor in Council, each to hold office until his successor is appointed.

(2) One of the members appointed by the Lieutenant Governor in Council shall be a judge of the district court of Alberta who shall be the chairman.

(3) The registrar of the Department shall be the secretary of the Board.

(4) The Lieutenant Governor in Council may fix the remuneration of the members of the Board.

21. (1) A person who is found guilty of unprofessional or unethical conduct may appeal to the Teaching Profession Appeal Board within fifteen days from the date he is given notice of such finding.

(2) Every appeal shall be commenced by delivering a written notice of appeal to the registrar of the Department and to the executive secretary of the association.

(3) The registrar of the Department shall notify the Minister, the executive council and the person of the time and place of the hearing of the appeal.

(4) All parties to the appeal may appear in person or by counsel.

(5) Upon hearing the appeal the Board shall review the evidence adduced before the disciplinary committee and the findings and report of the discipline committee and the executive council and may

(a) affirm or reverse the decision of the discipline committee, or

(b) if the decision is affirmed, confirm or vary any penalty imposed by the executive council.

(6) The decision of the Board shall be determined by the majority of its members and is final and binding on all parties.

(7) The decision of the Board shall be conveyed in writing to all parties to the appeal.

22. A person who contravenes this Act or any of the bylaws made hereunder is guilty of an offence and liable on summary conviction to a fine of not more than twenty-five dollars.

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APPENDIX G

CODE OF ETHICS

Code of Ethics

The Code of Ethics shall apply to all members, and the term "teacher" as used in this code includes all members of The Alberta Teachers' Association. A complaint of violation of this code made to the Association by any person or group shall be regarded by the Provincial Executive Council of the Association as a charge of unprofessional conduct under the Discipline Bylaws of the Association. Excessive or flagrant violation of the Standards of Professional Conduct by any member of the Association may also lead to discipline charges being laid against that member.

1. The teacher does not criticize the professional competence or professional reputation of a colleague except to proper officials and then only in confidence and after the colleague has been informed of the criticism.

2. The teacher recognizes the Association as the official spokesman of the teachers in Alberta. Individuals or groups purporting to speak on behalf of teachers to the officials of colleges, institutions or universities, or to the government, its members or officials, on matters affecting the interests of teachers generally, do so only with the prior consent of the Provincial Executive Council.

3. The teacher provides documents relevant to engagement or advancement requested by the employer.

4. The teacher adheres to collective agreements negotiated by the Association.

5. The teacher fulfills contractual obligations with an employer until released by mutual consent or according to law.

6. The teacher does not apply for nor accept a colleague's position before it has been declared vacant.

7. The teacher does not divulge information received in confidence or in the course of professional duties, except as required by law, or where, in the judgment of the teacher, it is in the best interests of the child.

8. The teacher does not accept pay for tutoring his own pupils in the subjects in which he gives classroom instruction.

9. The teacher does not use his professional position for personal profit by offering goods or services to his own pupils or their parents.

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APPENDIX H

STANDARDS OF PROFESSIONAL CONDUCT

Standards of Professional Conduct

The Standards of Professional Conduct shall apply to all members, and the term "teacher" as used in this statement of standards includes all members of The Alberta Teachers' Association. This statement does not attempt to define all items of acceptable conduct. These items are minimum standards of professional behavior which members are expected to observe. Excessive or flagrant violation of the Standards of Professional Conduct by any member of the Association may lead to a charge of unprofessional conduct under the Discipline Bylaws of the Association.

IN RELATION TO PUPILS

1. The teacher shall diagnose needs, prescribe and implement instructional programs and evaluate the progress of students and may not delegate these responsibilities to any person who is not a teacher.

2. The teacher may delegate specific aspects of instructional activity to noncertificated personnel on a short-term basis only.

3. The teacher treats pupils with dignity and respect and is considerate of their circumstances.

IN RELATION TO THE GENERAL PUBLIC

4. The teacher does not engage in activities which adversely affect the quality of his professional service and acts in such manner as to maintain the honor and prestige of the profession.

5. The teacher endeavors to improve the quality of education.

IN RELATION TO EMPLOYERS

6. The teacher does not accept a position with an employer whose relations with The Alberta Teachers' Association are unsatisfactory without first consulting the Association.

7. The teacher intending to terminate employment with a school authority gives notice of intention as early as possible.

8. After accepting a position, the teacher notifies other boards to which applications were submitted.

9. The teacher protests both the assignment of duties for which he is not qualified and conditions which make it difficult to render professional service.

IN RELATION TO COLLEAGUES

10. The teacher does not undermine the confidence of pupils in other teachers.

11. The teacher submits to the Association disputes arising from professional relationships with colleagues which cannot be resolved by personal discussion.

12. The teacher observes a reasonable respect for the authority of school administrators and recognizes the duty to protest through proper channels, administrative policies and practices which he cannot in conscience accept; and further recognizes that if administration by consent fails, the administrator must adopt a position of authority.

13. The teacher as an administrator respects staff members as individuals and provides continuous opportunities for staff members to express their opinions and bring forth suggestions regarding the administration of the school.

14. The teacher, before making any report on the professional competence of a colleague, provides him with a copy of the report and forwards with it any written comment that the colleague chooses to make.

IN RELATION TO THE ASSOCIATION

15. The teacher adheres to Association policy and seeks to change such policy only through the proper channels of the Association.

16. The teacher accepts service to the Association as a professional obligation.

17. The teacher who has requested representation by the Association honors commitments made on his behalf.

IN RELATION TO PROFESSIONAL GROWTH

18. The teacher strives to improve his educational practices.

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APPENDIX I

DISCIPLINE BYLAWS OF THE ALBERTA TEACHERS' ASSOCIATION

Discipline Bylaws of The Alberta Teachers' Association

*1. (1) The Provincial Executive Council shall appoint and shall maintain for the purposes hereinafter named, a committee of active members of the Association, the chairman of which shall be named by the Provincial Executive Council, to be known as the Discipline Committee, five in number, of whom three shall constitute a quorum.

(2) The members shall hold office for two years from the effective date of their appointment. Any vacancy in the committee shall be filled by the Provincial Executive Council appointing a member to complete the unexpired term of the member vacating.

(3) The Provincial Executive Council shall appoint a secretary of this committee whose term shall be at the pleasure of the Provincial Executive Council.

2. (1) The committee shall meet from time to time for the dispatch of business, and subject to *The Teaching Profession Act* and any regulations made by the Provincial Executive Council, may regulate the convening, notice, place, management and adjournment of such meetings and of its hearings, the appointment of a vice-chairman, the mode of deciding questions, the transaction and management of business and the procedure relating to the conduct of its hearings.

(2) If there is a quorum present at any meeting, the committee may act, notwithstanding any vacancy in its body and in the case of vacancy, may appoint a member of the Provincial Executive Council to fill the vacancy until the next meeting of the Provincial Executive Council.

*3. (1) Whenever it appears that a member has been guilty of unprofessional or unethical conduct:

(a) any member or group of members may request in writing an investigation,

(b) any person or group may lodge a written charge of unprofessional or unethical conduct.

(2) The request for an investigation or the charge shall be mailed or delivered to the executive secretary of the Association and shall set out the nature and the particulars of the complaint.

(3) Upon receipt of a request for an investigation or of a charge of unprofessional or unethical conduct, the Provincial Executive Council may, and upon receipt of a written charge shall, direct that an investigation be conducted by an investigating officer who shall not be a member of the Discipline Committee or its secretary, provided that the member whose conduct is under investigation be informed of this action and also be informed of the investigating officer's recommendation.

(4) The investigating officer shall report the results of his investigation to the executive secretary or the assistant executive secretary.

(5) If the investigating officer's report indicates that there are grounds warranting a hearing by the Discipline Committee, the Provincial Executive Council shall order the said committee to hold a hearing and, if no prior charge of unprofessional or unethical conduct has been lodged, shall formulate such a charge.

(6) The Provincial Executive Council may demand from any person or group lodging a written charge of unprofessional or unethical conduct, and before directing the Discipline Committee to hold a hearing, a reasonable sum as a deposit to cover the necessary costs and expenses, and, in case the complaint is found to be frivolous or vexatious, the deposit may be so applied; otherwise the deposit shall be returned to the person or group making the same.

(7) Where time is of the essence, the functions of the Provincial Executive Council under subsections (3), (5) and (6) of this bylaw may be performed by any one of the president, past president, vice-president, executive secretary, or assistant executive secretary of the Association, whose decision shall, however, be subject to review by the Provincial Executive Council.

(8) The Provincial Executive Council, on recommendation of the Discipline Committee, may pay to a member against whom a charge of unprofessional or unethical conduct has been found to be frivolous or vexatious such of the costs incurred by him in his defence as it deems just.

*4. (1) Whenever the Discipline Committee has been directed to hold a hearing, its secretary shall in accordance with the provisions of *The Teaching Profession Act* cause to be served on the person whose conduct is the subject of the hearing and upon the complainant a notice setting forth the date, place, time and subject matter of such hearing.

(2) In setting the time, place and date of such hearing, regard shall be had to the convenience of the committee and all parties concerned.

*See 'Revisions to Discipline Bylaws'

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5. The committee may at the expense of the Association employ legal counsel who shall assist in the presentation of evidence and shall advise the committee upon questions of procedure and law, but who shall not be present during the committee's determination of the guilt or innocence of the accused.

***6.** The secretary of the Discipline Committee shall cause a record of its proceedings to be taken.

7. For the purpose of procuring the attendance of any person as a witness before the Discipline Committee, the committee or any member thereof, or the secretary of the committee, may cause to be served on such person a notice requiring him to attend before the committee and to produce such documents as he would be compelled to produce at the trial of an action at law. Such notice shall be served in the same way and shall have the same effect as a notice requiring the attendance of a witness at the hearing of a trial at law and the penalties in the case of disobedience to any such notice shall be as provided by *The Teaching Profession Act.*

***8.** (1) In the event a person who is found guilty of unprofessional or unethical conduct appeals to the Teaching Profession Appeal Board in the manner provided by *The Teaching Profession Act* the delivery of a notice of appeal shall serve to suspend the operation of the Provincial Executive Council's disciplinary action and any action taken by the Minister on the recommendation of the Provincial Executive Council until the final determination of such appeal or its abandonment.

(2) Upon being notified of the delivery of a notice of appeal the executive secretary shall forward to the registrar of the Department of Education a copy of the record of proceedings before the Discipline Committee, the transcript or notes of the evidence adduced, the exhibits filed, the committee's report to the Provincial Executive Council and the Provincial Executive Council's decision.

(3) Any party to the appeal shall upon request and upon payment for same at the rate of twenty-five cents per page be furnished with copies of said documents.

9. (1) Unprofessional conduct shall include breaches or violations of the ATA Code of Ethics or excessive or flagrant breaches of the ATA Standards of Professional Conduct.

(2) Without in any way restricting the generality of subsection (1) hereof, every member shall be deemed guilty of unprofessional conduct who:

(*a*) wilfully takes, because of animosity or for personal advantage, any steps to secure the dismissal of another teacher;

(*b*) wilfully circulates false reports derogatory to any fellow teacher or to any other person directly associated with education in the Province of Alberta;

(*c*) maliciously, carelessly, irresponsibly or otherwise not in fulfilment of official duties, criticizes the work of a fellow teacher in such a way as to undermine the confidence of the public and pupils;

(*d*) where he is one of a local group, bargains on his own behalf on questions affecting each and all members of the group;

(*e*) is addicted to the excessive use of intoxicating liquors or the excessive or habitual use of opiates or narcotics;

(*f*) has been convicted of an offence under *The Juvenile Delinquents Act* or an indictable offence under the Criminal Code.

REVISIONS TO DISCIPLINE BYLAWS

Bylaws in the preceding copy which are marked with an asterisk were the subject of electoral votes which were approved by the 1972, 1973 and 1975 Annual Representative Assemblies. However, these amendments cannot take effect until they also have the approval of the Lieutenant Governor-in-Council (Section 15, *The Teaching Profession Act*). Some amendments to *The Teaching Profession Act* are also prerequisite. When that statute has been amended, approval of the bylaw revisions will be requested. As changed by the electoral votes, the affected bylaws will read—

1. (1) The Provincial Executive Council shall appoint and shall maintain for the purposes hereinafter named, a committee of active members of the Association, the chairman of which shall be named by the Provincial Executive Council, to be known as the Discipline Committee, five in number, of whom three shall constitute a quorum.

(2) The Provincial Executive Council shall appoint and shall maintain for the purposes hereinafter named, a committee of active members of the Association, the chairman of which shall be named by the Provincial Executive Council, to be known as the Professional Competence Committee, five in number, of whom three shall constitute a quorum. [Electoral Vote 24 of 1971]

(3) The members shall hold office for two years from the effective date of their appointment. Any vacancy in the committee shall be filled by the Provincial Executive Council appointing a member to complete the unexpired term of the member vacating.

(4) The Provincial Executive Council shall appoint a secretary of each committee whose term shall be at the pleasure of the Provincial Executive Council.
[Electoral Vote 25 of 1971]

(5) The term 'committee' as used in these bylaws shall mean the Discipline Committee or the Professional Competence Committee as the context requires.
[Electoral Vote 26 of 1971]

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3. (1) Whenever it appears that a member has been guilty of unprofessional or unethical conduct or professional incompetence:

(a) any member or group of members may request in writing an investigation,

(b) any member or group of members may lodge in writing a charge of professional incompetence,

(c) any person or group may lodge in writing a charge of unprofessional or unethical conduct.

[Electoral Vote 27 of 1971]

(2) The request for an investigation or the charge shall be mailed or delivered to the executive secretary of the Association and shall set out the nature and the particulars of the complaint.

(3) Upon receipt of a request for an investigation of unprofessional or unethical conduct or professional incompetence, the Provincial Executive Council may, and upon receipt of a charge shall, direct that an investigation be conducted by an investigating officer who shall not be a member of the committee or its secretary, provided that the member whose conduct or competence is under investigation be informed of this action and also be informed of the investigating officer's recommendation. [Electoral Vote 28 of 1971]

(4) The investigating officer shall report the results of his investigation to the executive secretary or the assistant executive secretary.

(5) If the investigating officer's report indicates that there are grounds warranting a hearing, the Provincial Executive Council shall order the committee to hold a hearing and, if no prior charge of unprofessional or unethical conduct or professional incompetence has been lodged, shall formulate such a charge.

[Electoral Vote 29 of 1971]

(6) The Provincial Executive Council may demand from any person or group lodging a charge in accordance with Bylaw 3 (1) and before directing the committee to hold a hearing, a reasonable sum as a deposit to cover the estimated costs and expenses of a hearing, and, in case the complaint is found to be frivolous or vexatious, the deposit may be so applied; otherwise the deposit shall be returned to the person or group making the same. [Electoral Vote 30 of 1971]

(7) Where time is of the essence, the functions of the Provincial Executive Council under subsections (3), (5) and (6) of this bylaw may be performed by any one of the president, past president, vice-president, executive secretary, or assistant executive secretary of the Association, whose decision shall, however, be subject to review by the Provincial Executive Council.

(8) The Provincial Executive Council may, on recommendation of the committee, pay to a member acquitted of a charge of unprofessional or unethical conduct or professional incompetence such of the costs incurred by him in his defence as Council deems just.

[Electoral Vote 31 of 1971 and Electoral Vote 4 of 1974]

4. (1) Whenever the committee has been directed to hold a hearing, its secretary shall in accordance with the provisions of *The Teaching Profession Act* cause to be served on the person charged and upon the complainant a notice setting forth the date, place, time, and subject matter of such hearing.

[Electoral Vote 32 of 1971]

(2) In setting the time, place and date of such hearing, regard shall be had to the convenience of the committee and all parties concerned.

(3) Hearings of the committee shall be in camera, except that, if the member who has been charged so requests, the committee may in its discretion order a public hearing. [Electoral Vote 5 of 1974]

6. The secretary of the committee shall cause a record of its proceedings to be taken.

[Electoral Vote 33 of 1971]

8. (1) In the event a person who is found guilty of unprofessional or unethical conduct or professional incompetence appeals to the Teaching Profession Appeal Board in the manner provided by *The Teaching Profession Act*, the delivery of a notice of appeal shall serve to suspend the operation of any action of the Provincial Executive Council and any action taken by the Minister on the recommendation of the Provincial Executive Council until the final determination of such appeal or its abandonment. [Electoral Vote 34 of 1971]

(2) Upon being notified of the delivery of a notice of appeal, the executive secretary shall forward to the registrar of the Department of Education a copy of the record of proceedings before the committee, the transcript or notes of the evidence adduced, the exhibits filed, the committee's report to the Provincial Executive Council and the Provincial Executive Council's decision. [Electoral Vote 35 of 1971]

(3) Any party to the appeal shall upon request and upon payment for same at the rate of twenty-five cents per page be furnished with copies of said documents.

10. Without in any way restricting the generality of the term 'professional incompetence', the following constitute evidence of incompetence:

(a) continual failure or inability to establish and maintain an atmosphere conducive to learning,

(b) continual failure to be adequately prepared to guide and/or direct the learning process.

[Electoral Votes 49 and 50 of 1972]

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APPENDIX J

THE SCHOOL ACT
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THE SCHOOL ACT

Teachers

73. A board shall employ as a teacher only a person who holds a certificate of qualification as a teacher issued under The Department of Education Act, 1970.

74. (1) In this section "day" or "day in a school year" means a day on which instruction is given by a teacher and includes emergency school closures, school closures approved by the Minister, two days for teacher convention, holidays declared by a board and days other than instruction days that are approved by the Minister.
(2) Unless a teacher agrees, a board may not require a teacher to instruct pupils
(a) for more than 330 minutes during a day, or
(b) for less than 190 or more than 200 days in a school year.
(3) Subject to subsection (2) but notwithstanding any other agreement to the contrary the terms and conditions of a contract of employment between a board and a teacher shall be
(a) except in the case of a teacher excluded under section 82, subsection 5, the terms and conditions negotiated under The Alberta Labour Act and agreed between the board and an organization representing teachers,
(b) sections 74 to 81 of this Act, and
(c) the terms and conditions agreed between the board and the teacher,
and any contract excluding or purporting to exclude the provisions of clauses (a) and (b) is void.
(4) Every contract of employment between a board and a teacher shall be entered into by an offer in writing by a person acting on behalf of the board and accepted in writing by the teacher.
(5) For the purposes of this section an offer, acceptance, confirmation, statement or notification shall be in writing and may be sent by registered mail or by telegraph or delivered by hand or ordinary mail.

75. (1) A board may transfer a teacher from one school or room in its charge to another at any time during the school year.
(2) The board shall give to the teacher concerned seven days' notice in writing of the transfer.
(3) Within seven days after receiving notice of the transfer, the teacher may request in writing, an opportunity to be heard before the board.
(4) If a hearing is requested, the transfer shall not be effective until the teacher has been heard before the board or a committee thereof.
(5) Notwithstanding section 81 a teacher who has been transferred by a school board may, after subsections (3) and (4) of this section have been complied with, resign upon 30 days' notice if he does not wish to comply with the transfer order of the board.

76. (1) Unless there is agreement to the contrary a contract of employment between a board and a teacher continues in force from year to year.
(2) A board shall send to the Minister a copy of every agreement it enters into with a teacher which does not continue in force from year to year, within 30 days of the agreement being entered into.

77. (1) A contract of employment between a board and a teacher automatically terminates

(a) at the time the certificate of qualification of the teacher is suspended or cancelled by the Minister, or

(b) if the certificate of qualification of the teacher expires, or

(c) on the last day of the school year if the teacher has attained 65 years of age.

(2) A contract of employment between a board and a teacher may be terminated by mutual consent.

(3) For the purpose of subsection (1), clause (c), "school year" means the period from July 1 to the following June 30.

78. (1) A board may terminate

(a) a contract of employment with a teacher, or

(b) a designation of a teacher made pursuant to section 82,

after giving the teacher notice of the termination not less than 30 days prior to the effective date of the termination.

(2) A notice of termination of contract of employment or of a designation shall specify the reasons for the termination and in each case the board shall act reasonably.

(3) A board may suspend from his duties any teacher who has been served with a notice of termination of contract or of a designation.

(4) A notice of termination of a designation or the termination thereof does not terminate a contract of employment.

(5) A teacher who has been suspended is entitled to receive pay until the effective date of termination.

79. (1) Where a board has reasonable grounds for believing that

(a) a teacher has been guilty of gross misconduct, neglect of duty or refusal or neglect to obey a lawful order of the board, or

(b) the presence of a teacher is detrimental to the well-being of the school for reason of mental infirmity,

the board may suspend the teacher from performance of his duties.

(2) The board shall

(a) give notice of the suspension in writing to the teacher specifying therein the reasons for the suspension, and

(b) forward a copy of the notice of suspension together with a written statement of the facts alleged to the Minister.

(3) A teacher who is suspended by a board may appeal to the Minister within 14 days after receiving the notice of suspension.

(4) The Minister shall refer the appeal to the Board of Reference who shall

(a) investigate the matter and confirm or reverse the decision of the board, and

(b) inform the board and the teacher of its decision within 10 days of the conclusion of its investigation.

(5) Where a teacher is suspended pursuant to subsection (1), clause (b) the Board of Reference may require the teacher to produce a certificate from a medical practitioner appointed or approved by it, certifying as to the teacher's health.

(6) If the teacher refuses or fails to produce a certificate pursuant to subsection (5) the Board of Reference may authorize the board to terminate the contract of employment of the teacher and upon so doing the board shall be deemed to have acted reasonably.

(7) Where the Board of Reference confirms the suspension the board may terminate the suspension or terminate the contract of employment of the teacher.
(8) Where the teacher does not appeal to the Minister, the board shall make an investigation of the circumstances and may reinstate the teacher.
(9) A teacher shall be paid his salary until his contract of employment is terminated in accordance with this Act.

80. (1) A teacher may terminate a contract of employment with a board after giving the board 30 days' notice in writing of his intention.
(2) Where a teacher has terminated his contract of employment with a board before rendering any service under the contract, no other board shall employ the teacher unless the prior approval of the board with which the teacher's contract was terminated, is first obtained.

81. Subject to section 77, subsection (2) no notice of termination of a contract of employment may be given by a board or a teacher
(a) in the 30 days preceding, or
(b) during
a vacation period of 14 or more days' duration.

82. (1) A board shall designate one teacher to be the principal of each school.
(2) Notwithstanding subsection (1), a board may designate a teacher to be the acting principal of a school for a period not exceeding one year.
(3) Where a board has designated an acting principal under subsection (2) a designation of a principal for that school shall be made within the following 12 months.
(4) A board may designate any teacher to an administrative, supervisory or consultative position.
(5) Where an organization representing teachers carries on collective bargaining on behalf of them, a board and the organization, through negotiation, may include in or exclude from the teachers on whose behalf the organization is bargaining, any teacher designated under subsection (4).

83. (1) A teacher on receipt of a termination of designation may terminate his contract of employment by giving 30 days' notice in writing to the board, notwithstanding section 81.
(2) No appeal may be made from a termination of a contract to the Board of Reference, if the contract of employment is terminated pursuant to subsection (1).

Board of Reference

84. (1) The Lieutenant Governor in Council shall appoint a Board of Reference consisting of not more than nine persons.
(2) The members of the Board of Reference shall receive such remuneration and expenses as the Lieutenant Governor in Council determines.

85. (1) Where a disagreement arises between a board and a teacher with respect
(a) to a termination of a contract of employment, or
(b) to a termination of a designation, or
(c) to the refusal of a board to give an approval pursuant to section 80, subsection (2),
a board or a teacher, may appeal to the Minister who shall refer the appeal to the Board of Reference.

(2) An appeal may be withdrawn at any time before or during the hearing of the appeal or before the decision of the Board of Reference.

86. (1) The notice of appeal shall be in writing and shall set out the nature of the appeal.
(2) The board or teacher appealing shall within 14 days of the receipt of the notice of termination of contract send by registered mail
(a) to the Minister
(i) the notice of appeal, and
(ii)$50 (which is held by the Minister pending the decision of the Board of Reference,
and
(b) to the other party to the appeal a copy of the notice of appeal.

87. (1) The Board of Reference shall set a date for the hearing of the appeal and and notify both parties.
(2) The Board of Reference may make such investigation as it considers necessary but before making any decision shall give both parties to the appeal an opportunity to be heard.
(3) Notwithstanding any provision of this Act concerning the
(a) termination of a contract of employment of a teacher, or
(b) termination of a designation of a teacher, or
(c) suspension of a teacher,
and matters connected therewith, the Board of Reference may make such order as it considers just with respect to the appeal.
(3.1) Without restricting the generality of subsection (3), the Board of Reference may, among other orders, make all or any of the following orders:
(a) an order providing that the termination date of the contract of employment or of a designation be changed;
(b) an order to provide for the reinstatement of a contract of employment or of a designation (but only where the teacher is the party appealing);
(c) an order for the payment of money, equivalent to salary, for any period whether before or after the termination of the contract or of a designation that a salary has not been paid;
(d) an order providing that no salary be paid for a specified period.
(4) Each party to the appeal shall pay his own costs unless the Board of Reference otherwise orders and in the event that no order as to costs is made, the $50 held by the Minister shall be repaid to the person who paid it to him.
(5) The Board of Reference may make one or more of the following orders concerning the $50 paid to the Minister:
(a) that it be paid in whole or part to the person against whom the appeal was made in payment or part payment of costs;
(b) that it be retained in whole or part by the Minister and paid into the General Revenue Fund;
(c) that it be repaid in whole or part to the person who paid it to the Minister.
(6) For the purpose of making an investigation pursuant to this section the Board of Reference has the powers of a commissioner under The Public Inquiries Act.

88. (1) The Minister, in any case in which he considers it proper to do so, may refer an appeal to any one or to any two or more members of the Board of Reference.
(2) Upon a reference of an appeal to the member or members of the Board of Reference pursuant to subsection (1), the member or members have all the powers, duties and function of the Board of Reference and his or their decision shall be deemed to be a decision of the Board of Reference.

89. (1) A teacher may teach without a contract of employment pursuant to section 74 only when employed on a day to day basis or to fill a vacancy expected in advance to be less than 20 consecutive teaching days.
(2) Neither a teacher who teaches without a contract of employment pursuant to section 74, nor the board employing him, may appeal to the Board of Reference.